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CONCESSION AGREEMENT

BY AND BETWEEN

THE CITY OF FRESNO

AND

Effective Date: _____

Lease Year: _____

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CONCESSION AGREEMENT

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EXHIBITS

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CONCESSION AGREEMENT

This Concession Agreement ("Agreement") is made and entered into this _____ day of _____, 2002 by and between the CITY OF FRESNO, a California municipal corporation hereinafter referred to as the "City" and _____ a _____ organized and existing under the laws of the State of _____ and duly admitted and authorized to do business in the State of California, hereinafter referred to as the "Concessionaire."

WITNESSETH:

WHEREAS, the City now operates an airport known as Fresno Yosemite International Airport (Fresno Air Terminal, or, the "Airport") located in Fresno County, California; and

WHEREAS, the City has selected competitive proposals from qualified operators for the operation of a _____ concession; and

WHEREAS, the City desires that a portion of the concession areas at the Airport described hereinafter be developed as a _____ concession ("the Concession" (as such term is hereinafter defined), upon the terms and conditions in this Agreement and in the City's Airport Tenant Handbook which is incorporated herein by this reference; and

WHEREAS, Concessionaire desires and is ready, willing and able to establish the Concession at the Airport upon the terms and conditions herein.

NOW, THEREFORE, in consideration of the foregoing recitals, which recitals are contractual in nature, the mutual covenants herein and for other good and sufficient consideration the City and the Concessionaire hereby mutually agree, each for itself and its successors and assigns, as follows:

ARTICLE I DEFINITIONS

1.1 "Agreement" shall mean this _____ Concession Agreement between the City and the Concessionaire for the right, privilege and obligation to continuously and uninterruptedly through the Term of this Agreement, to occupy, operate and manage the Assigned Premises as defined herein for the specific purpose described in Article VI herein under the terms and conditions expressly set forth herein.

1.2 "Airport" shall mean the tract of land and any enlargements thereof with all improvements thereon and to be erected thereon, designated as "Fresno Yosemite International Airport," also known as the "Fresno Air Terminal," including the existing Terminal, existing Concourse, and future Concourse Expansion (together, the "Facilities") all as depicted on **Exhibit A**.

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1.3 "Assigned Premises" shall mean the area or areas in the Facilities designated by this Agreement including the Exhibits hereto as the place or places where the Concession may be conducted pursuant to this Agreement.

1.4 "Bond Resolutions" shall mean the Resolutions of the City, adopted: _____, and other facilities therein described, as same may be amended or supplemented from time to time .

1.5 "Concessionaire" shall mean _____, or its permitted successors or assigns.

1.6 "Director of Transportation" or "Director" shall mean the Director, or his/her designee, of the Airport as from time to time appointed by the City.

1.7 "Disadvantaged Business Enterprise" and "DBE" shall mean, as certified and verified by the City, a business, whether it is a corporation, sole proprietorship, partnership or joint venture, of which at least 51 percent of the interest is owned and controlled by one or more socially and economically disadvantaged individuals as defined in the Airport and Airways Safety and Capacity Expansion Act of 1987 and the regulations promulgated pursuant hereto at 49 CFR Part 23.

1.8 "Effective Date" shall mean the date upon which the City Council approves this Agreement

1.9 "Fixed Improvements" shall mean all structural or permanent-type improvements made by Concessionaire pursuant to Paragraph 11.1 of this Agreement, including but not limited to ceilings, walls, floors, and all interior and storefront finishes and coverings, power, water and other utility installations and connections, and light fixtures, all of which are affixed to the Assigned Premises. Any kiosk installed on or in the Assigned Premises shall be deemed a Fixed Improvement.

1.10 "Gross Revenue" shall mean all monies or other consideration paid or payable to Concessionaire, its officers, employees and agents from all sales of Concessionaire from all business conducted upon or from the Assigned Premises by Concessionaire and all others, and whether such sales be evidenced by cash, check, credit charge account, exchange or otherwise, and shall include, but not be limited to, the amount received from the sale of goods, wares and merchandise and for services performed on or at or originated from the Assigned Premises, together with the amount of all orders taken, received or originated at the Assigned Premises or sales completed by delivery at the Assigned Premises, whether such orders be filled from the Assigned Premises or elsewhere. Gross Revenue shall specifically include any monies or other consideration paid or payable to Concessionaire, its officers, employees and agents for the use and occupancy of any product display areas, window display areas or signage areas. Gross Revenue shall not include sales of merchandise for which verifiable refunds, or allowances have been made on merchandise claimed to be defective or unsatisfactory, provided such sales have been included in Gross Revenue. When properly recorded and accounted for, Gross Revenue shall not include the amount of any sales, use or gross receipts tax imposed by any federal, state, municipal or governmental authority directly on sales and collected from customers, provided that the amount thereof is added to the selling price or absorbed therein, and paid by the Concessionaire to such governmental authority. No franchise or capital stock tax and no income or similar tax based upon income or profits as such shall be deducted from Gross Revenue in any event whatsoever. Each charge or sale upon installment or credit shall be treated as a sale for

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the full price in the month during which such charge or sale shall be made, irrespective of the time when Concessionaire shall receive payment (whether full or partial) thereof. No deduction from Gross Revenue shall be allowed for uncollected or uncollectable installment or credit accounts, credit card discounts or thefts.

Notwithstanding anything to the contrary in this Agreement, the term Gross Revenues shall not include the following:

- a. Any sale or transfer of all, or such a substantial part of the stock or merchandise of the Concessionaire so as to constitute a "bulk transfer" defined as a transfer in bulk, and not in the ordinary course of business, of materials, supplies, merchandise, inventory, or equipment or sale of the stock or merchandise or business of Concessionaire in connection with the winding down or dissolution of the Concessionaire's business at the Assigned Premises or the sale or transfer of all or substantially all of the Concessionaire's assets or business at the Assigned Premises;
- b. Transfers of merchandise or goods between similar stores owned or operated by Concessionaire in the ordinary course of business; and
- c. Any money received from an insurance or indemnity company or companies as a result of loss, damage, or destruction of or to the merchandise of Concessionaire's or Concessionaire's trade fixture, unless otherwise provided in this Agreement.

1.11 "Lease Year" or "Year" shall have the meaning ascribed to it in Paragraph 4.2 herein.

1.12 "Minimum Rent" shall mean the minimum amount of money due to the City annually from the Concessionaire in consideration of the rights granted Concessionaire under this Agreement.

1.13 "Percentage Rent" shall mean the sum of money due the City on account of the City's share of Gross Revenues as hereinafter provided.

1.14 "Personal Property" shall mean all furniture and other portable property furnished and used by Concessionaire in its operations hereunder not affixed to the Assigned Premises.

1.15 "Term" shall have the meaning ascribed to it in Paragraph 4.2 herein.

1.16 "Trade Fixtures" shall mean all appliances, signage and any other major equipment or improvements commonly regarded as trade fixtures with a useful life in excess of three (3) years, installed by Concessionaire pursuant to Article XI of this Agreement for use in its operations hereunder. Trade Fixtures may be affixed to the Assigned Premises provided the same may be easily removed without damage to the Assigned Premises. The term Trade Fixtures as used herein shall not include attached shelving, lighting fixtures other than freestanding lamps. Any item normally defined as a Trade Fixture, which is affixed to the Assigned Premises in such a manner as to cause damage to the Assigned Premises upon such items removal, shall be deemed a Fixed Improvement.

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For purposes of this Agreement, Concessionaire's exterior store signage shall be deemed a Trade Fixture.

ARTICLE II ASSIGNED PREMISES

2.1 Description and General Obligations: The City hereby grants to the Concessionaire and the Concessionaire takes from the City the right to use _____ (____) individual locations comprising a total of approximately _____ (____) square feet of space in the Facilities as hereinafter described and more specifically set forth on **Exhibit B**, incorporated herein by reference, and hereafter referred to as the Assigned Premises. It is understood and agreed that, upon completion of construction of the Assigned Premises, "as built" drawings may be substituted as Exhibit B without further amendment hereto.

2.2 Possession: The City and Concessionaire hereby agree that the Concessionaire's taking possession of the Assigned Premises shall be deemed conclusive evidence of Concessionaire's acceptance of the Assigned Premises in satisfactory condition and in full compliance with all covenants and obligations of the City in connection therewith. Concessionaire agrees that it will accept possession of the Assigned Premises in a "where-is", "as-is" condition and that the City has made no representations or inducements respecting the condition of the Assigned Premises to the Concessionaire.

ARTICLE III RECAPTURE

3.1 The City reserves the right to recapture the Assigned Premises anytime during the Term of this Agreement if the City, in its sole and absolute discretion, determines that the Assigned Premises are required for changes in or expansion of space for hold rooms, ticket counters or other airline operations, or the requirement of such space for public facilities, utilities, or other uses directly related to the furnishing of air transportation services. In such event, the City shall cause buy-out of the Net Book Value of the Concessionaire's Fixed Improvements in the Assigned Premises in accordance with Paragraphs (A) and (B) below (the "Buy-Out"). This Agreement shall terminate thirty (30) days after the giving of written notice by the City to the Concessionaire of the City's determination to recapture such Assigned Premises.

The City may offer substitute space to the Concessionaire in connection with recapture of the Assigned Premises. Nothing in this Agreement shall be deemed to require that the City offer substitute space, or that the Concessionaire accept substitute space. The offering of substitute space will be in the sole and absolute discretion of the City; provided, however, that any such substitute space shall be offered (if at all) by the City to the Concessionaire at least thirty (30) days before the effective date of the recapture. After the recapture of all or a portion of any of Concessionaires individual locations comprising the Assigned Premise, and the acceptance or refusal of any substitute space by the Concessionaire, if the total square footage of any of the individual locations is reduced by more than twenty-five (25) percent due to this recapture provision, the City shall make an adjustment to the Minimum Rent, effective on the date of such recapture. The adjustment to the Minimum Rent shall be based on the proportion of the total recaptured area to the total square

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footage of the Assigned Premises.

In the event that substitute space is offered and accepted, the Concessionaire shall make all necessary improvements to such space within ninety (90) days of the date such space becomes available to Concessionaire. All construction and installation shall be in accordance with the provisions of Article XI. Concessionaire shall amortize/depreciate the costs of all Fixed Improvements installed in such substitute space over the remaining portion of the Term of the Agreement, it being understood that Concessionaire shall not be entitled to any buy-out of improvements to such substitute space at the end of the Term.

- a. "Net Book Value" shall mean the original cost of a capital expenditure made by Concessionaire for a Fixed Improvement, less accumulated amortization or depreciation (as appropriate), calculated in accordance with Article XI, as of the date on which the Concessionaire is required to surrender the Assigned Premises or portion thereof, prorated. Concessionaire's original cost shall include reasonable and direct costs for such Fixed Improvements as defined in Paragraph 11.1.
- b. Any buy-out payment made by or on behalf of the City under the terms of this Article III shall be paid to Concessionaire by the end of the thirtieth (30th) calendar day following the date the Concessionaire has surrendered the Assigned Premises and has submitted the statement of Net Book Value to the City, whichever is later. Within a reasonable time prior to the date such Buy-Out payment is due (and subject to update immediately prior to the time the Buy-Out payment is made), the Director shall be entitled to inventory and inspect all Fixed Improvements with respect to which such Buy-Out payments have been or are to be made, and, if any such inventory and inspection indicates that such an improvement is either missing or substantially damaged, the amount of the Buy-Out payment allocated to such improvement shall be either: (i) subtracted from the Buy-Out payment (in the event the improvement is missing); or (ii) reduced by the amount required to repair the damage as determined by the Director (in the event the improvement is substantially damaged); provided, however, that no such improvement or fixture shall be deemed to be "substantially damaged" if such improvement is merely obsolete or worn out in accordance with normal and reasonable retail use. Simultaneously with its receipt of the Buy-Out payment, Concessionaire shall deliver to the City a Bill of Sale containing full warranties of title, conveying title to the Fixed Improvements contained in the Assigned Premises surrendered, free of all liens and encumbrances, in an "as is-where is" basis. In the event any of such Fixed Improvements are subject to any liens or encumbrances, the amount of the Buy-Out payment shall be reduced by the amount necessary to satisfy such liens or encumbrances.

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ARTICLE IV LEASE TERM

4.1 This Agreement shall be effective and binding as of the date first set forth above (the "Effective Date").

4.2 The Term of this Agreement shall begin on the first day of the first month next following the date the Concessionaire commences its business in the reconstructed Leased Premises, but in no event later than _____, and shall continue in full force and effect, unless terminated prior thereto as hereinafter provided, until _____. Each Lease Year shall be a successive period of twelve (12) calendar months. The first Year of the Term shall include that time after such commencement of the Term prior to the first day of the first month following such commencement date.

4.3 All rentals, fees, charges and payments due hereunder shall begin on the effective date.

4.4 Failure of Tenant to Open: In the event that Concessionaire fails to open for business each and every one of the individual locations which comprise the Assigned Premises fully fixtured, stocked and staffed, in accordance with the Airports rules regulations and criteria, within sixty (60) days of receipt of a building permit then the City shall have, in addition to any and all remedies herein provided, the right, at its sole option, to collect additional rent at the rate of 1/360th of the Minimum Rent per day until each and every one of the said Assigned Premises has been opened for business, fully fixtured, stocked and staffed in accordance with the Airports rules regulations and criteria. The sixty (60) day period described herein shall be extended for any period of delay caused by the events stated in Paragraph 20.16 herein.

4.5 At the expiration of the term of this Agreement, for all of the Assigned Premises, the Net Book Value of Concessionaire's Fixed Improvements shall be \$0.00.

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ARTICLE V SURRENDER OF PREMISES

5.1 Condition on Surrender: At the expiration or earlier termination of this Agreement, Concessionaire shall quit and surrender up the Assigned Premises to the City, peaceably, quietly and broom clean and in the same condition as when tendered by the City, or hereinafter improved by Concessionaire, reasonable wear and tear and insured casualty excepted. All Trade Fixtures or Personal Property installed in the Assigned Premises by Concessionaire shall be removed by Concessionaire, provided that Concessionaire is not in default hereunder, and further provided that the same can be removed without damage to the Assigned Premises or the Airport. At the sole option of the City, all Fixed Improvements shall, without compensation to the Concessionaire, become the property of the City, free and clear of all claims to or against them by Concessionaire or any third person, upon surrender of the Assigned Premises by the Concessionaire for whatever reason. Should the City elect not to take ownership of any Fixed Improvements, prior to the date of surrender Concessionaire shall be solely responsible for the expense of the removal of said Fixed Improvements and restoring the Assigned Premises to the same condition as when originally tendered by the City. In the event that Concessionaire shall fail to remove its Personal Property and/or Trade Fixtures on or before the termination (whether by expiration of the Lease Term, cancellation, forfeiture, or otherwise, whichever first occurs) of this Agreement, at the sole option of the City, (i) said Personal Property and Trade Fixtures may be stored at a public warehouse or elsewhere at Concessionaire's sole cost and expense; or (ii) title to such Trade Fixtures and Personal Property shall vest in the City, free and clear of all claims to or against them by Concessionaire or any third person, at no cost to the City, in the manner allowed by law. In such event the City shall not be responsible for any losses related to such Personal Property or Trade Fixtures and the City may sell or otherwise dispose of such items.

5.2 Holding Over: - In the event Concessionaire shall hold over and remain in possession of the Assigned Premises after the expiration of the Term of this Agreement without or without the consent of the City, such holding over shall not be deemed to operate as a renewal or extension of this Agreement (or any lease or license hereunder) but shall only create a month-to-month permit at the same rentals, fees, charges, and other terms, conditions and covenants contained in this Agreement and effective at the time holdover commenced, which may be terminated at any time by the City or the Concessionaire by providing written notice to the other to be effective on the first day of the month following the month in which such notice was served.

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ARTICLE VI USES AND PRIVILEGES

6.1 The Concessionaire has the exclusive right, privilege, and obligation to continuously and uninterruptedly occupy, operate and manage the Assigned Premises in accordance with the provisions of this Agreement, subject to the provisions of Paragraph 9.1, for the following purposes and as more specifically outlined in **Exhibit C**, attached hereto and incorporated herein by reference, only.

INSERT PERMITTED USE

Food and Beverage Agreement Only:

*Concessionaire shall also have the specific right, privilege and obligation to sell such permitted merchandise from its Assigned Premises as are defined and described in **Exhibit C**, attached hereto and incorporated herein by reference, and for no other purpose whatsoever.*

Concessionaire's business in the Assigned Premises shall be conducted under the common name of "_____." Concessionaire shall not use or permit the Assigned Premises to be used under any other trade name without the City's written consent, such consent not to be unreasonably withheld. Concessionaire acknowledges and hereby agrees that the identity, skill, experience and reputation of the Concessionaire, the specific character of the Concessionaire's business, the anticipated use of the Assigned Premises, potential for payment of Percentage Rent and the relationship between such use and other uses within the Facilities were all relied upon by the City and served as significant and material inducements contributing to the City's decision to entering into this Agreement with the Concessionaire. Any change in the character of Concessionaire's business, trade name or use shall constitute a material default under this Agreement.

6.2 In the event the Director, in his sole opinion, determines that any item or service displayed, offered for sale or sold by the Concessionaire is objectionable, Concessionaire shall, upon written notice from the Director, immediately remove such item or service from display and from its inventory and Concessionaire agrees that it shall not thereafter display, offer for sale, or sell such item or service.

6.3 The sale of items or services other than those identified in Exhibit C or discontinuance of the sale of items or provision of services identified in Exhibit C by Concessionaire shall not be permitted without prior written approval of the Director, who may withhold approval for any reason whatsoever or for no reason. Concessionaire shall be required to provide the Director, at a minimum, in written form, the following information for consideration of any modification of Exhibit C:

- a. Clear description of the items to be added/deleted;
- b. Current prices at off-Airport locations for the affected item(s);
- c. Rationale for the addition/deletion with supporting justification, such as sales volume, trends, etc.

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The Directors consideration of Concessionaire's written request to alter Exhibit C, either addition or deletion, shall be based upon, among other items, the determination that such addition/deletion reflects and enhances the overall theme of the concession.

6.4 The Concessionaire shall have no right under this Agreement to provide, display, dispense, offer or sell any _____ on the Assigned Premises or other items of any kind, type or nature except such permitted merchandise approved by the Director in Exhibit C. Concessionaire shall not install or suffer to be installed any amusement, dispensing or vending machine on the Assigned Premises.

6.5 Concessionaire shall not, within its Assigned Premises, offer for sale or install, maintain or operate, or suffer to be installed, "Display Facilities" for the provision of commercial advertising of any item, product, service or thing which is not available as a item, service, product for sale or product for demonstration within the Assigned Premises. The term "Display Facilities" as used in the preceding sentence shall mean and refer to display cases, exhibits, dioramas, backlit showcases, courtesy direct-line phone boards, or brochure dispensers. Notwithstanding anything contrary in this Agreement, this paragraph is not intended to limit or disallow Concessionaire from utilizing a Display Facility for the purpose of advertising Concessionaire's products or business. The City requires that any Display Facilities for the purpose of advertising Concessionaire's product or business receives the written approval of the City prior to installation. Such approval shall be in the sole and absolute discretion of the City.

6.6 Exclusivity: It is expressly provided that the rights and privileges granted hereunder are granted on an exclusive basis, except as provided for in Paragraph 9.1. In the event that the Trigger Level is achieved and the percentage fees are changed according to the terms of Paragraph 9.1, all rights and privileges granted hereunder shall immediately be non-exclusive, and nothing herein shall preclude the City from entering into an agreement with any other parties during the remaining term of this Agreement for the sale in any part of the Facilities of the same or similar merchandise or service which Concessionaire is permitted to sell or offer hereunder, whether such agreements are awarded competitively or through negotiations and regardless of whether the terms of such agreements are more or less favorable than the terms of this Agreement, except that Concessionaire shall have the right of first refusal to develop a similar concept in the contemplated space in the Facilities.

6.7 The Concessionaire has the non-exclusive right of ingress and egress from its Assigned Premises, subject to any rules or regulations which may have been established or may be established in the future by the Director or the City. Such rights of ingress and egress shall apply to the Concessionaire's employees, guests, patrons, invitees, suppliers and other authorized individuals. The rights of ingress and egress likewise apply to the transport of equipment, material, machinery and other property. In connection with any such ingress or egress, the Concessionaire shall not, and shall not permit others, to obstruct or otherwise interfere with any airline's or other tenant's operations or use of the Facilities or the Airport.

6.8 Should a conflict arise between the Concessionaire and other tenants or concession operators at the Airport regarding the scope of concession privileges, the decision of the Director

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shall be final.

6.9 While the City may provide parking facilities to the Concessionaire's employees in common with employees of other Concessionaire's and users of the Airport, it retains the right to impose a reasonable charge for the privilege of utilizing these parking facilities. Nothing herein contained shall be deemed to require the City to provide parking facilities to Concessionaire's employees.

6.10 If applicable, Concessionaire shall provide the Director a copy of any health inspection report within 24 hours after Concessionaire receives such report. If a health inspection does not result in a report, Concessionaire shall submit a written summary of the nature and findings of such inspection as they were communicated to the Concessionaire. Concessionaire shall also provide the Director with any required corrective actions and timeframes for each corrective action to be continuously implemented.

ARTICLE VII OPERATIONAL STANDARDS

7.1 Adherence to Standards: Concessionaire, its employees, agents, and servants shall at all times observe, obey and adhere to all the standards, rules, regulations and procedures which may from time to time be promulgated by the City. Further, Concessionaire, its employees, agents and servants shall comply with all laws and regulations of the United States of America, the State of California and of governmental authorities having jurisdiction over Concessionaire's operation hereunder. The Director, in his sole opinion, shall have the right to determine the Concessionaire's compliance with all operational standards, rules, regulations or procedures.

7.2 Airport Performance Operating Standards: Concessionaire shall be required to observe, obey and abide by all such applicable operating performance standards, rules, regulations or procedures, as may be amended from time to time by the Director. Failure of Concessionaire to observe, obey and abide shall result in the application by the City of Liquidated Damages in the amount as set forth in Exhibit _.

7.3 Concessionaire Standards: Concessionaire shall be required to submit to the City a copy of any customer service, operations, etc. standards and shall ensure continuous adherence to Concessionaires own standards in addition to the City standards as set forth herein.

7.4 Testing and Inspection by the Airport: Concessionaire hereby acknowledges and agrees that the Airport may monitor, test or inspect Concessionaire's services at any time through the use of its own direct review and/or the use of third parties and/or by other reasonable means that do not unduly interfere with Concessionaire's business.

7.5 Hours of Operation: The Assigned Premises shall be continuously and uninterruptedly open for business and provide all services and sales activities as required by the Agreement at such hours as may be established by the Director, from time to time in his sole and absolute discretion ("Airport Hours"). Concessionaire hereby understands and agrees that the Airport Hours may be seven (7) days per week, including local, state and federal holidays, for all

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hours of airline operations. The Concessionaire shall not be deemed to have breached or be in default in respect of such operating requirement as a result of temporary closing of the Concessionaire's business within the Assigned Premises in connection with maintenance or repairs, renovation or remodeling, inventories or other temporary closing in the normal course of the Concessionaire's business provided that Concessionaire has received from the Director, prior to such temporary closing, in writing, permission for such temporary closing. Concessionaire shall be required, in each of the individual locations which comprise the Assigned premises, to prominently post in an area visible to employees the most current copy of the Airport Hours.

7.6 Operations During Periods of Flight Delays: In the event of delayed flights within the terminal and/or concourse on which the Assigned Premises is located, Concessionaire shall be required to remain continuously open and provide all services and sales activities as required by the Agreement, even if such period is beyond the current Airport Hours, until said flights depart the gate or other instructions are provided by the Airport.

7.7 Liquidated Damages for Failure to Maintain Airport Hours: If for four (4) or fewer hours during any day, Concessionaire is not open and conducting business during the Airport Hours, then at the City's sole option, Concessionaire shall pay in addition to the Minimum Rent or Percentage Rent and all other sums due hereunder, an amount equal to the per diem Minimum Rent then in effect calculated on the basis of a three hundred sixty (360) day year. If for more than four (4) hours but less than or equal to eight (8) hours during any day Concessionaire is not open and conducting business during the Airport Hours, then at the City's sole option, Concessionaire shall pay in addition to the Minimum Rent or Percentage Rent and all other sums due hereunder, an amount equal to three (3) times the per diem Minimum Rent then in effect calculated on the basis of a three hundred sixty (360) day year. If for more than eight (8) hours during any day Concessionaire is not open and conducting business during the Airport Hours, then at the City's sole option, Concessionaire shall pay in addition to the Minimum Rent or Percentage Rent and all other sums due hereunder, an amount equal to four (4) times the per diem Minimum Rent then in effect calculated on the basis of a three hundred sixty (360) day year. Concessionaire acknowledges that failure to open and conduct business during the Airport Hours will (i) cause the City to lose Percentage Rent; (ii) be detrimental to the retail image of the Facilities due to Concessionaire's Assigned Premises being closed; and (iii) result in decreased impulse shopping traffic to other areas of the Facilities thereby potentially decreasing the sales volume of other Concessionaire's in the Airport. The exact monetary value of said losses and/or injuries caused by Concessionaire's failure to be open and conducting business during the Airport Hours is extremely difficult and impractical to fix; therefore the parties agree that the above described sums represent fair and reasonable estimates of such the monetary value of such losses and/or damages. Nothing herein shall diminish the City's right to terminate this Agreement or exercise any other remedy available to the City for failure of Concessionaire to carry on its business during the Airport Hours.

7.8 Concessionaire's Conduct of Business:

- a. Concessionaire shall operate its business in the Assigned Premises so as to maximize the gross sales produced by such operation and shall maintain an adequate staff of employees and maintain in the Assigned Premises at all times a stock of merchandise as is reasonably designed to produce the

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maximum return to the City, for the use of the Assigned Premises by a like Concessionaire, and will tend to assure the City a return of the greatest possible amount of Percentage Rent.

- b. Concessionaire shall have its display windows, signs, interior sales area, and permitted advertising displays adequately illuminated continuously during the Airport Hours and, if such hours are less than 24 hours, such additional hours as the Director may establish from time to time in the Directors sole and absolute discretion.
- c. Concessionaire hereby acknowledges that other concessionaires at the Airport may provide similar and competing business services. As it is imperative that passengers, employees and visitors at the Airport are fairly and unbiasedly informed of the range of choices available regardless of the fact that the desired service/product/information may be better provided by a competitor, Concessionaire hereby agrees that it, its employees, directors, officers, and guests shall inform the public of services available elsewhere and shall direct the public to those other services if sought by the public.

7.9. Interior Store Signage: Except as indicated in Paragraph 6.5, Concessionaire shall be permitted and required to install and operate signs on the Assigned Premises to market the products and/or services offered for sale in the Assigned Premises. All signs shall be accurate, showcase a cross section of product and be visible. All interior store signage shall require the prior written approval of the Director prior to installation. Such signage shall assist and complement the overall effective and creative merchandising and marketing of the permitted merchandise. All signage shall be professionally designed, no hand lettered or hand modified signs shall be permitted without the prior written approval of the Director.

- a. All displays, posters, computer or TV projections, and sounds in the Assigned Premises shall reflect good taste, be professionally developed and presented in such a manner as not to be offensive to the general public and be of such high caliber so as to reflect the dignity of the Airport and the services provided to the public by the City. All reasonable complaints from the public to the City, or from the City, will be forwarded to the Concessionaire in writing. Concessionaire shall remedy such offensive items within two (2) calendar days of receipt of said complaints.
- b. Any marketing program in the Facilities, lasting longer than five (5) consecutive calendar days, shall be subject to the review and approval of the Director. Any program that the Director determines unacceptable, in his sole and absolute discretion, shall be removed from the Facilities within two (2) days of receipt of written notice to do so.
- c. Concessionaire shall not advertise an individual airline's transportation services or other goods or services offered in connection therewith on or in the Assigned Premises without the prior written approval of the Director.

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The foregoing shall not be deemed to prohibit: (i) the sale or distribution within the Assigned Premises of any permitted merchandise which includes or features advertising or promotion of an airline provided that the names or marks of any such other airline (as distinguished from the goods themselves) which might visibly appear on the packaging or exterior of any of the foregoing goods shall not be prominently displayed anywhere within the Assigned Premises.

7.10 Product Labeling: Concessionaire shall individually label each product, or list each product with its appropriate price on menu/product/service boards, with the appropriate price in an area clearly visible to the passenger. If applicable, Concessionaire shall have menus of products/services available for sale. Any such menu shall include the use of descriptive terminology that accurately describes the product(s). Any terminology or statement that the Director, in his sole and absolute discretion, determines is false or misleading shall be immediately removed. Menus shall be of excellent quality and sufficient in number to meet peak period demands. If reasonably required by the Director to enhance customer service for international passengers, Concessionaire shall create, execute and maintain on hand an adequate number of menus printed in languages other than English. Concessionaire shall be responsible for a maximum of two additional non-English versions of any menu.

7.11 Entrances: Concessionaire shall ensure that the passenger entrances to the Assigned Premises are kept clear of any boxes, cartons, barrels or other similar items which would impede entrance/exit from the Assigned Premises. Piling of boxes, cartons, barrels or other similar items in an unsightly or unsafe manner within the Assigned Premises is forbidden.

7.12 Merchandising: Concessionaire shall be specifically required and obligated to have continuously in-stock, on display and available for sale a full and complete stock of such permitted merchandise from its Assigned Premises as is defined and described in Exhibit C. Concessionaire shall ensure that all such merchandise is at all times attractively and logically arranged and that all merchandise displays are fully stocked with product.

7.13 Entertainment Systems: No radio or television or other similar device shall be installed without first obtaining in each instance the Director's written consent, which consent may be withheld for any reason whatsoever or for no reason. No antenna or aerial shall be erected on the roof, interior walls or exterior walls of the Assigned Premises, the Facilities or on the Airport without in each instance first obtaining the prior written consent of the Director. Any radio, television, or other similar device, antenna or aerial so installed without such prior written consent shall be subject to removal and/or forfeiture without notice at any time. The cost of said removal shall be borne by the Concessionaire. No loudspeakers, televisions, phonographs, radios, or other devices shall be used in a manner so as to be heard or seen outside the Assigned Premises without the prior written consent of the Director, whose consent may be withheld for any reason whatsoever or for no reason.

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7.14 Promotions: If applicable, Concessionaire shall be required to submit to the Director by the 1st day of each Lease Year a promotional program, including dates, types of merchandise and theme of promotions, for the upcoming year. Concessionaire shall ensure that all promotions conducted in the Assigned Premises are located in a prominent location and are timely.

7.15 Employee Discount: Concessionaire shall be required to provide discounts for any person employed on-Airport, either by the City or by an Airport tenant. Revenues from employee-discount sales shall be considered part of Gross Revenues until Gross Revenues reach the level after which additional percentage rents are paid to the City. For all sales above this level, employee-discount sales shall not be subject to percentage rents.

7.16 Delivery: All loading and unloading of goods, the delivery or shipping of merchandise, supplies, and fixtures to and from the Assigned Premises shall be done only at such time, in the areas, and through the routes designated for such purposes by the City, as determined in the sole and absolute discretion of the Director. Concessionaire shall be required to make significant efforts to avoid using the public areas for large quantity deliveries during peak periods. Concessionaire shall ensure that any items being transported within the Airport are handled with care in a manner that ensures that items are safely packaged within appropriate containers. Concessionaire may be required to utilize delivery carts or devices which are in strict conformance with the Airport Tenant Handbook.

7.17 Plumbing Facilities: The plumbing facilities shall not be used for any purpose other than that which they are constructed, and no foreign substance of any kind shall be thrown therein, and the expense of any breakage, stoppage, or damage resulting from a violation of this provision, wherever such occurs, shall be born by Concessionaire who may, or whose employees, agents, invitees may, have caused it.

7.18 Method of Payment: The Concessionaire shall accept and honor US currency, major companies travelers types checks and at least the following three major credit cards: American Express, Visa and MasterCard for any purchase.

7.19 Point of Sale Devices: Concessionaire shall install and use, or cause to be installed and used at the Assigned Premises, cash registers, sales slips, invoicing machines and other automatic accounting equipment or devices required to properly and accurately record the Gross Revenues on all sales, by type and location, services, and other business transactions made by Concessionaire under this Agreement all of which are in conformance of the Airports specifications.

All transactions recorded on these devices shall be visibly displayed so that the amount recorded can be viewed by customers from a reasonable distance.

All persons handling sales shall promptly recover said sales (cash or credit) in cash registers and other electronic or mechanical devices and shall not delay or “gang” register or record such sales.

7.20 Foreign Currency: Concessionaire shall not be required to accept foreign currency.

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If Concessionaire independently elects to accept foreign currency, such may only be accepted for payment of goods at the prevailing exchange rate. No foreign currency exchange shall be permitted.

7.21 Level of Service: Concessionaire shall conduct its concession operation in a first class manner in accordance with the highest standards for similar operations at airports of comparable size and standards throughout the United States. Concessionaire shall conduct its operation to provide prompt and timely service. Concessionaire shall maintain its Assigned Premises and conduct its operations at all times in a safe, clean, orderly and inviting condition, to the satisfaction of the Director. The Concessionaire shall not create any nuisance, annoy, or be offensive or disturbing to others.

7.22 Management: All concession operations shall be supervised at all times by an active, qualified, competent manager or a qualified assistant manager in the manager's absence. The manager or qualified assistant manager shall be available at the Assigned Premises during the Airport Hours, or any additional hours the Concessionaire is open for business. Said manager shall have full authority to make day-to-day business decisions on behalf of Concessionaire, with respect to the Assigned Premises, and shall be responsible for ordering and receiving merchandise, maintaining merchandise and supplies, and supervising sales personnel and other personnel employed in the business of the Concessionaire, represent the Concessionaire in dealings with the City, and coordinate all concession activities with the City. Concessionaire will cause such manager to be assigned a duty station or office on the Airport (which may be located within the Assigned Premises).

7.23 Staffing Levels: Concessionaire shall recruit, train, supervise, direct and deploy the number of representatives, agents and employees, collectively referred to as "personnel" necessary to promptly provide services to all customers and to meet all of the requirements of this Agreement. Concessionaire shall be continuously responsible for actively managing personnel levels to ensure that changes in passenger activity, due to schedule changes, load factor changes or flight delays are adequately accommodated through increased levels of personnel. Any actual or perceived degradation in (a) the customer service requirements set forth in this Agreement or other duties, rights or responsibilities set forth in this Agreement provided by Concessionaire in the course of conducting Concessionaire's permitted uses; or (b) the training and competence of Concessionaire's personnel shall be conveyed to the Concessionaire and Concessionaire hereby agrees that it shall promptly institute training programs and/or add additional adequately trained and capable staff to the satisfaction of the City.

7.24 Personnel: Concessionaire shall ensure that all personnel utilized in its Assigned Premises shall conform to the following:

- a. All personnel employed by the Concessionaire shall be neat, clean and courteous at all times.
- b. No loud, boisterous or otherwise improper actions or language shall be permitted while on or about the Airport.
- c. Concessionaire shall, at its sole cost and expense, provide each member of the

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sales staff with a uniform of a design to be approved by the City, in its reasonable discretion, which shall be worn whenever said staff are on the Facilities.

- d. Personnel shall prominently display nametags, Airport Identification badges and any other specified airport badges and/or pins while on the Airport.
- e. All personnel shall be attentive to customer needs, display a positive attitude and refrain from discussing personal issues/problems within the sales areas of the Assigned Premises.
- f. All personnel shall know and utilize practices of good customer service such as (1) assisting customers with purchase decisions; (2) identify product alternatives; (3) possess and display good product knowledge; and (4) utilize appropriate suggestive selling.
- g. All personnel shall provide warm, friendly, smiling, prompt and courteous service.
- h. All personnel shall be proficient with and trained in the required operations of all equipment and devices used in the Assigned Premises to facilitate sales (i.e. Point of sale devices, credit card transaction equipment, etc.).
- i. All personnel shall be familiar with all applicable policies of this Agreement, the Airport and Concessionaire.
- j. All personnel engaged in sales activities shall speak and comprehend English, at a level appropriate to their duties.

7.25 Customer Complaints: Concessionaire shall be required to respond to any complaints in writing within ten (10) days of receipt, with a good faith effort to explain, resolve or rectify the corresponding problem. Concessionaire shall provide the Airport with a copy of any complaint received the same day it is received by the Concessionaire and shall provide the Airport with a copy of the written response the same day it is sent. Complaints received by the Airport shall be forwarded to the Concessionaire, who shall respond utilizing the above procedure.

Concessionaire shall be required to implement and utilize a customer comment system (cards, telephone, web, etc.). All such completed comments and Concessionaire summary reports shall be provided to the Airport within 10 days of receipt/completion.

7.26 Pricing: Concessionaire acknowledges by its entering into this Agreement, the City's desire and obligation to provide the traveling public with a mix of high quality products and a high level of public service at prices comparable to off airport locations. Concessionaire shall adhere to this pricing requirement. Permitted prices and charges shall apply to each item separately and independently.

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Prices and charges for all items or services sold or offered from the Assigned Premises shall not exceed the greater of (i) manufacturer's printed suggested retail price (pre-price), if applicable; or (ii) the highest price charged for the same or similar products sold at the same or similar concepts located off-Airport in the Fresno metropolitan area.

Prior to, or upon, execution of this Agreement, and on the first business day of each Lease Year thereafter, the Concessionaire shall, at its own expense, conduct a survey of said off-Airport locations to determine appropriate price levels. This survey shall, at a minimum, include each of Concessionaire's items and services and the price of the same items or services for each of the surveyed facilities. If exact items or services are not available for particular items or services, Concessionaire must include the price(s) of reasonably comparable items or services. The Concessionaire shall provide text descriptions, and any other appropriate information explaining the product similarities and/or dissimilarities. The annual survey shall be provided to the Director within fourteen (14) calendar days following completion of the survey, but in no event no later than the first calendar day of the third month of the Lease Year. Concessionaire will, within fourteen (14) calendar days of completion of the annual survey, adjust any prices that are inconsistent with this Paragraph 7.26. Failure to rectify any pricing discrepancies within the aforementioned fourteen (14) calendar day period shall constitute a material breach by Concessionaire of this Agreement and, in addition to all other remedies of the City, the City may, in its sole and absolute discretion, terminate this Agreement.

Concessionaire shall be required to receive written approval from the Director prior to any increase in the price of any item or service sold or offered from the Assigned Premises. Any such request must be accompanied by a survey of off-Airport locations to indicate that the requested increase is in accordance with the stipulations of this, and any other applicable, section(s). The increase of any items or services price by Concessionaire without such prior written consent shall be deemed a material breach of this Agreement.

7.27 Product: All items sold or offered at the Assigned Premises shall be first quality and conform to all applicable regulations. Concessionaire shall at all times maintain the degree of quality and quantity for all items offered for sale comparable to items offered for sale at similar restaurants in the Central Valley. The quality, quantity and specifications of all items shall at all times be subject to the review and approval of the Director. Concessionaire shall restore products and/or specifications to the Director's reasonable satisfaction within ten (10) days of such notice.

7.28 Interfere with Systems: Concessionaire shall not do, or permit, anything which may interfere with the effectiveness of utility, heating, ventilating or air-conditioning systems or portions thereof on or adjoining the concession facilities (including lines, pipes, wires, conduits and equipment connected with or appurtenant thereto) or interfere with the effectiveness of elevators or escalators in or adjoining the concession facilities, or overload any floor in the concession premises.

7.29 Smoking: Per California law, Smoking shall not be permitted in any of the individual locations which comprise the Assigned Premises. Concessionaire shall not do anything contrary to the California law, Airport policy, ordinances, rules and regulations regarding smoking.

7.30 Unauthorized Locks: Concessionaire shall not place, or suffer to be placed, any

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additional lock of any kind upon any window or interior or exterior door in the Assigned Premises, or make any change in any existing door or window lock or the mechanism thereof. Concessionaire shall pay Airport, on demand, the cost for replacement thereof, and the cost of re-keying any such locks.

7.31 Auction: Concessionaire shall not permit, or undertake itself in any sale by auction upon the concession premises.

7.32 Loitering or Lodging: Concessionaire shall not permit undue loitering on or about the Assigned Premises or use the Assigned Premises, for lodging or sleeping purposes.

ARTICLE VIII HAZARDOUS MATERIALS

8.1 Concessionaire covenants and agrees that it will not use, store, maintain, discharge or operate, whether intentionally or unintentionally, on the Assigned Premises or the Airport in violation of any applicable federal, state, county or local statutes, laws, regulations, rules, ordinances, codes, standards, orders, licenses or permits of any governmental authorities, relating to environmental matters (being hereafter collectively referred to as the Environmental Laws) including by way of illustration and not by way of limitation; the Clean Air Act, the Federal Water Pollution Control Act of 1972, the Resource Conservation and Recovery Act of 1976, the Comprehensive Environmental Response, the Compensation and Liability Act of 1980 and the Toxic Substances Control Act (including any amendments or extensions thereof and any rules, regulations, standards or guidelines issued pursuant to any Environmental Laws). Except in compliance with all Environmental Laws, Concessionaire, its subsidiaries, subcontractors and suppliers, and anyone on the Airport with the consent of the Concessionaire shall not discharge “Hazardous Substances” (as defined hereinafter) into the sewer and/or storm water drainage system serving the Airport, or cause any Hazardous Substances to be placed, held, stored, processed, treated, released, or disposed of on or at the Airport. Upon termination of this Agreement, Concessionaire shall, at its sole cost and expense, immediately remove from the Airport all Hazardous Substances and all tanks and other containers which are being used or were used, by the Concessionaire, its subsidiaries, subcontractors, or suppliers, or anyone on the Airport with the consent of the Concessionaire, to hold Hazardous Substances, discharged or occasioned from the Concessionaire’s operations or the operations of any of its subsidiaries, subcontractors, or suppliers, or anyone on the Airport with the consent of the Concessionaire. “Hazardous Substances” shall mean any material that, because of its quantity, concentration or physical or chemical characteristics, is deemed by any federal, state or local governmental authority authorities having jurisdiction over Concessionaire’s operation hereunder to pose a present or potential hazard to human health safety or to the environment. Hazardous Substances include, by way of illustration and not by way of limitation, any substance defined as a “hazardous substance” or “pollutant” or “contaminant” pursuant to any Environmental Law; any asbestos and asbestos containing materials; petroleum, including crude oil or any fraction thereof, natural gas or natural gas liquids; and any other toxic, dangerous or hazardous chemicals, materials or substance of waste(s).

8.2 Neither Concessionaire, its members, officers, agents, servants, employees nor customers shall cause any Hazardous Substance to be brought upon, kept, used, stored, generated or

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disposed of in, on, or about the Assigned Premises or the Airport, or transported to or from the Assigned Premises or the Airport unless such action is in compliance with all applicable Environmental Laws and the Airports guidelines and rules and regulations. Concessionaire shall be required to keep, at the Assigned Premises in an orderly and easily accessible manner, all records evidencing its compliance with all applicable Environmental Laws and the Airports guidelines and rules and regulations for all Hazardous Substances brought upon, kept, used, stored, generated or disposed of in, on, or about the Assigned Premises or the Airport, or transported to or from the Assigned Premises. Concessionaire shall maintain such records from the Effective Date until the expiration or earlier termination of this Agreement. Concessionaire expressly understands, acknowledges and agrees that all such records shall be kept for a period of three (3) years after the expiration or earlier termination of this Agreement.

8.3 Concessionaire shall indemnify, defend, and hold harmless the City from and against any and all claims, damages, costs, losses and liabilities arising during or after the Term as a result of or arising from: (a) a breach by Concessionaire of its obligations contained in the preceding Paragraphs 8.1 and 8.2, or (b) any release of Hazardous Substance from, in, on or about the Assigned Premises or the Airport caused by any act or omission of Concessionaire, its members, officers, agents, servants, employees and customers or, (c) the existence of any Hazardous Materials within the interior portions of the Assigned Premises.

8.4 Upon reasonable notice, the Director shall have, upon his reasonable direction, the right to require Concessionaire, at Concessionaire's sole expense, to conduct an environmental audit of the interior portions of the Assigned Premises for possible environmental contamination or violation of any applicable Environmental Laws or violation of the Airports guidelines and Rules and Regulations. In the event Concessionaire fails to conduct such an Audit upon request, the Director shall have the right, but not the obligation, to conduct or cause to be conducted an environmental audit or any other appropriate investigation of the Assigned Premises for possible environmental contamination or violation of any applicable Environmental Laws or violation of the Airports guidelines and Rules and Regulations. If such audit is performed by other than the Concessionaire, , Concessionaire shall pay all costs associated with said investigation in the event such investigation shall disclose any Hazardous Substance contamination or violation of Environmental Law or violation of the Airports guidelines and rules and regulations as to which the Concessionaire is liable hereunder

8.5 Prior to the expiration or earlier termination of the Agreement, Concessionaire, upon the written request of the Director, shall be required to provide documentation, prepared by a firm acceptable to the Director, that the interior portions of the Assigned Premises are free of Hazardous Substance Contamination and removal of all Hazardous Substances permitted herein have been removed in compliance with the Airport's guidelines, rules and regulations and all applicable laws. Such documentation may require an immediate remediation plan and/or long-term care and surveillance of any contamination identified and an acknowledgement of responsibility and indemnification for any and all losses associated with such contamination.

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ARTICLE IX RENTALS, FEES, CHARGES AND ACCOUNTABILITY

9.1 Concessionaire Rent: For all of the Assigned Premises during the entire Term of this Agreement, Concessionaire covenants and agrees to pay the City, in lawful money of the United States, without any prior demand and free from all claims, demands, set-offs or counter-claims of any kind, the greater of a. or b. below:

a. Minimum Rent:

A Minimum Rent of _____ and ____/100Dollars (\$_____) per Year. The Minimum Rent shall be adjusted annually to equal eighty-five percent (85%) of the prior Year's total payments by Concessionaire; however, in no event shall the Minimum Rent in any Year of the Term of this Agreement be less than _____ and ____/100Dollars (\$_____). Minimum Rent for any partial Lease Year during the Term shall be prorated on a per diem basis.

b. Percentage Rent:

Concessionaire shall pay to the City the sum of the following percentages of annual Gross Revenue:

INSERT APPLICABLE PERCENTAGE RENT SCHEDULES
--

In the event that the Airport, for any consecutive 12-month period, records in excess of 800,000 passenger enplanements (the "Trigger Level"), then the percentage fees in this Paragraph 9.1.b shall be void, and the Concessionaire covenants and agrees to pay the City, in lawful money of the United States, without any prior demand and free from all claims, demands, set-offs or counter-claims of any kind, the greater of a. above or c. below, beginning in the month following the 12-month period in which the Trigger Level was achieved:

c. Percentage Rent:

Concessionaire shall pay to the City the sum of the following percentages of annual Gross Revenue:

INSERT APPLICABLE TRIGGER LEVEL PERCENTAGE RENT SCHEDULES
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9.2 Payments: In advance of or on the first calendar day of each calendar month during the Term of this Agreement, without prior demand or invoice, Concessionaire shall pay to the City one-twelfth (1/12) of the Yearly Minimum Rent. Beginning on the twentieth (20th) calendar day of the second month of the Term, and continuing until and including the month immediately following the expiration or other termination of this Agreement, the Concessionaire shall pay to the City an

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amount equal to the difference (if any) between the Percentage Rent for the immediately preceding month and the then applicable Minimum Rent; it being understood and agreed that even though the Percentage Rent is computed and payable monthly, it shall be recomputed on an annual basis. Concessionaire shall make all payments of all rentals, fees and charges required by this Agreement to the City of Fresno. All payments shall be mailed to the following address:

Director of Finance
Fresno Yosemite International Airport

Fresno, CA _____ - _____

9.3 Concessionaire Reports: Beginning on the second month of the Term of this Agreement, and continuing until and including the month immediately following the termination or expiration of this Agreement, on or before the twentieth (20th) calendar day of each calendar month, without prior demand, the Concessionaire shall submit to the City reports setting forth the amount of Concessionaire's Gross Revenues for the preceding calendar month, all in the format shown on **Exhibit D**, attached hereto and incorporated herein by reference. The City shall have the right to require Concessionaire to modify the report of Gross Revenues at any time. Such reports shall, at a minimum, reflect total Gross Revenues, Gross Revenues by individual Assigned Premises, and Gross Revenues by category (e.g., food, alcoholic beverages, etc.). Such reports shall be signed by a responsible accounting representative of the Concessionaire and shall set forth specifically the amount of Gross Revenues derived from its Assigned Premises.

The report of Gross Revenues and the computation of Percentage Rent due for the previous month shall, when paid and added to the previous months in the same Year, be no less than the amount of the total of the applicable Minimum Rent amounts for those months.

9.4 Both the City and the Concessionaire acknowledge and agree that the Concessionaire's monthly payments of the Percentage Rent and Minimum Rent shall be computed and reconciled on an annual basis on or before the twentieth (20th) calendar day of the next calendar month following the last calendar month of the Lease Year. If it is established that Concessionaire has overpaid the City, then such overpayment shall be credited to the fees and charges next thereafter due to the City from Concessionaire, provided that if the Term shall have expired or shall have been sooner terminated, then any such overpayment shall be remitted to the Concessionaire within thirty (30) calendar days provided Concessionaire is not in default as herein defined. If the Concessionaire shall be in default at such time and such default and all related damages, losses, costs and expenses have been determined and reduced to a monetary amount, then the excess of such overpayment, if any, over such amount shall be remitted to the Concessionaire within thirty (30) calendar days of such determination. If it is established that Concessionaire has underpaid the City, then such underpayment shall be due with the fees and charges next thereafter due to the City from Concessionaire, provided that if the Term shall have expired or shall have been sooner terminated, then any such underpayment shall be remitted to the City within thirty (30) calendar days.

9.5 The Concessionaire shall keep full and accurate books and pertinent original and

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duplicate records, which Concessionaire shall make available at the Airport within 30 days of any request by the City, showing all of Concessionaire's and its subtenants, assignees and licensees said Gross Revenues in a form consistent with good accounting practices for at least a 3 year period after the expiration or earlier termination of the Term of this Agreement. The City shall have the right itself or through its representatives at all reasonable times to audit and otherwise examine and inspect such books and records, including sales tax returns for the State of California. If Concessionaire requests, and the City agrees, that such audit or examination of records be conducted at a location other than at the Airport, Concessionaire shall reimburse the City for travel, expense and additional labor involved. Failure by the Concessionaire to provide such records within the time specified shall be considered an event of default and in addition to any other remedies available to the City, Concessionaire shall pay to the City, as Liquidated Damages, One Hundred and No/100 (\$100.00) per day until full and complete records as requested are provided. Concessionaire acknowledges that the failure to provide such records on a timely basis will cause injury to the City, the exact monetary value of said item is extremely difficult to determine, therefore, the parties agree that the above described sum represents a fair and reasonable estimate of the loss caused by the failure of Concessionaire to provide records on a timely basis. Pertinent original sales records shall include: (a) cash register tapes, including tapes from temporary registers; (b) serially numbered sales slips; (c) such other sales records, if any, which would normally be examined by an independent accountant pursuant to accepted accounting standards in performing an audit of Concessionaire sales.

9.6 The Concessionaire shall employ an independent certified public accountant who shall furnish a written report to the City stating that in its opinion all of Concessionaire's, its subtenants, assignees or licensees Gross Revenues during the preceding Year were correctly and completely reported in accordance with the terms of this Agreement. The Certified Public Accountants reports for the Concessionaire shall contain a list of the Gross Revenues, as shown on the books and records of Concessionaire reported to the City or Concessionaire during the period covered by the report. The independent certified public accountant shall certify that its review of the Concessionaires gross sales and Rent due the Airport was performed in accordance with generally accepted auditing standards and that the report was performed in accordance with the terms and provisions of this Agreement.

The Concessionaire shall also furnish a written report to the City listing the Concessionaire's, its subtenants, assignees or licensees, Gross Revenue during the preceding Year as reflected in the independent Certified Public Accountants' reports as hereinabove described. This report shall compute total Rent due to the City by Concessionaire, for Concessionaire's, its subtenants, assignees or licensees, Gross Revenues, during the prior Year and certify that all Rent due to the City, by Concessionaire's, its subtenants, assignees or licensees, operations at the Airport, were correctly and completely made in accordance with the terms of this Agreement. An officer of the Concessionaire who holds at a minimum the title of Vice President shall certify the Concessionaire's report. Attached to Concessionaire's report shall be the independent Certified Pubic Accountants reports as hereinabove described. These reports shall be completed within sixty (60) calendar days after the Year and shall be furnished to the City within five (5) calendar days of said reports completion.

Any financial statements or materials which reflect the financial condition (the "financial information") of the Concessionaire as a company or as operator of the Assigned Premises shall constitute the proprietary, confidential material of the Concessionaire to the extent provided in

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controlling law. The City covenants that, subject to controlling law and orders of courts of competent jurisdiction:

- a. None of the financial information shall be disclosed to any third person for any reason, except to agents, servants, employees, representatives, contractors or directors of the City, their staff or attorneys and on the condition that they likewise observe these conditions. Provided, however, this provision shall not include the City's disclosure in connection with its pursuit or defense of any claim arising under this Agreement.
- b. Any notations or remarks recorded for the City's records shall likewise be treated confidentially and not disclosed. Provided, however, this provision shall not include the City's disclosure in connection with its pursuit or defense of any claim arising under this Agreement..
- c. Upon completion of review, the originals of all proprietary and confidential materials shall be returned to Concessionaire. However, Concessionaire agrees that upon the City's request, Concessionaire will provide the financial information again to assure continued access by the City thereto.

9.7 Should any examination, inspection, and audit of such books and records by the City disclose an understatement of the Gross Revenues received from all operations in the Assigned Premises by three (3%) percent or more, the entire expense of such audit shall be paid by Concessionaire. Any additional Percentage Rent due shall be paid by Concessionaire to the City with interest thereon at the lesser of the rate of Eighteen percent (18%) per annum or the maximum interest rate permitted by law from the date such additional percentage rental became due.

9.8 Upon request one copy of any financial statements, quarterly or annual shareholder reports, or other publications of the Concessionaire shall be furnished to the City, within 10 days of receipt of such request, by the Concessionaire at Concessionaire's sole cost and expense.

9.9 Concessionaire shall within thirty (30) days of preparation provide the City with any copies of internal or external audit reports conducted for the Assigned Premises.

9.10 Past Due Rent and Additional Rent: If Concessionaire shall fail to pay, when the same is due and payable, any Rent, or amounts or charges as contained herein, such unpaid amounts shall bear interest from the due date thereof to the date of payment at the rate which is the lesser of eighteen percent (18%) per annum or the maximum interest rate permitted by law.

ARTICLE X

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UTILITIES

10.1 Concessionaire shall, in addition to any other rental, fee or charge, install any such utility meters in conformance with the City's specifications and pay for, and be solely responsible for all utilities required, used or consumed in the Assigned Premises, including but not limited to, gas, water (including water for domestic uses and for fire protection), telephone, electricity, garbage collection services, or any similar services. If the City shall decide to supply any of the utility services described herein, then Concessionaire shall pay to the City the amounts billed by the City for Concessionaire's utility consumption. Concessionaire and the City hereby agree that the City shall not be liable for any interruption or curtailment in utility services due to causes beyond the City's control or due to the City's alteration, repair, or improvement of the Assigned Premises or the Airport.

10.2 Non-interference with utilities: Concessionaire shall do nothing, and shall permit nothing to be done, that may interfere with the utilities on the Airport, by way of example without limitation such drainage or sewerage systems, fire hydrants, heating and air conditioning systems, electrical systems, domestic hot water, domestic cold water, gas, fire suppression systems, fire alarm system, or plumbing. Concessionaire's duty under this section includes but is not limited to preventing grease and oils from entering waste lines, drains, and sewers.

ARTICLE XI IMPROVEMENTS TO ASSIGNED PREMISES

11.1 Assigned Premises Improvements: Concessionaire agrees, at its sole expense, to construct, finish out, furnish and fixture the Assigned Premises, which specifically includes any and all utility or facility connections which are required to be connected at points outside of the Assigned Premises, in accordance with plans and specifications to be approved by the City. Upon receipt of the certified construction costs, as hereinafter described and defined, the Concessionaire will determine the actual amounts for Fixed Improvements. These calculations will be utilized as the basis for determination of Concessionaire's "Net Book Value."

Concessionaire's expenditures set forth above shall include reasonable direct costs, other than those excluded herein, paid by Concessionaire for work performed and materials furnished; provided, however, that Concessionaire shall not include in its calculation of the aforementioned expenditures: (1) cost for items with a useful life of less than three (3) years; (2) payments for architectural, engineering, professional and consulting services which exceed fifteen percent (15%) of the total of the costs of such Fixed Improvements; (3) interest and other financing charges; (4) any amounts paid directly or indirectly for by parties other than Concessionaire; or (5) Concessionaire's own overhead expenses; except that Concessionaire may include the reasonable cost of paying its own employees to perform architectural, engineering, professional or consulting services, subject to the fifteen percent (15%) limit set forth in (2), above.

Concessionaire agrees that **Exhibit E** shall be completed upon acceptance by the City of the statements submitted in accordance with Paragraph 11.11.

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11.2 All structural improvements, equipment and interior design and decor constructed or installed by the Concessionaire, its agents, or contractors, including the plans and specifications shall conform to all applicable statutes, ordinances, building codes, and rules and regulations of the City, other appropriate agencies, and commissions.

The City hereby advises the Concessionaire and the Concessionaire acknowledges notification, that portions of the Airport were constructed prior to the year 1980 and there is presumed to be asbestos and lead paint in the Airport. Any changes, alterations or improvements to the Assigned Premises by the Company which involves in any way the disturbance of any existing portions of the building or structure shall not be performed or undertaken by the Concessionaire until such disturbance shall have been approved in writing by the City.

11.3 Concessionaire Installation: Concessionaire shall, at Concessionaire's sole cost and expense, install all Trade Fixtures and Fixed Improvements and equipment required to operate its business (all of which shall be of first-class quality and workmanship) during the Term of this Agreement. All Trade Fixtures, signs, or other Personal Property installed in the Assigned Premises by Concessionaire shall remain the property of Concessionaire and may be removed at any time provided that Concessionaire is not in default hereunder and provided the removal thereof does not cause, contribute to, or result in Concessionaire's default hereunder; and further provided that the removal shall not cause damage to the Assigned Premises or Airport. If Concessionaire removes Trade Fixture or Personal Property during the term of this Agreement, Concessionaire shall replace same with Trade Fixtures or Personal Property of like or better quality. At the sole option of the City, all Fixed Improvements shall become the property of the City upon surrender of the Assigned Premises by the Concessionaire for whatever reason, however, the City may require Concessionaire to remove its Fixed Improvement (including Trade Fixtures and Personal Property) prior to surrender of the Assigned Premises. Concessionaire shall not attach any fixtures or articles to any portion of the Assigned Premises, nor make any alterations, additions, improvements, or changes or perform any other work whatsoever in and to the Assigned Premises, without in each instance obtaining the prior written approval of the City. Any alterations, additions, improvements, changes to the Assigned Premises or other work permitted herein shall be made by Concessionaire at Concessionaire's sole cost and expense.

11.4 Signs, Awnings, and Canopies: Upon completion of the improvements to the Assigned Premises, Concessionaire shall not be permitted to place or cause or allow to be placed or maintained on any exterior door, wall or window of the Assigned Premises any additional sign, awning or canopy or advertising matter or other thing of any kind, and will not place or maintain any exterior lighting, plumbing fixture or protruding object or any decoration, lettering, or advertising matter on the glass of any window or door of the Assigned Premises without first obtaining the Director's written approval, which approval may be withheld for any reason whatsoever or for no reason. Concessionaire further agrees to maintain such sign, awning, canopy, decoration, lettering, advertising matter or other thing as may be approved in good condition and repair at all times. Any sign, awning or canopy or advertising matter or other thing of any kind so installed without the written approval of the Director shall be subject to removal without notice at any time. The cost of such removal shall be at the Concessionaire's sole cost and expense.

11.5 Facility Improvements and Trade Fixtures: As additional consideration for the rights

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and privileges granted in this Agreement, the Concessionaire agrees to expend a minimum of _____ and ____/100 Dollars (\$_____), for Fixed Improvements, Trade Fixtures, and Personal Property to construct the Assigned Premises. Opening costs, in-house design costs and amounts paid for by Concessionaire's vendors, suppliers, distributors or other parties shall not count toward this minimum expenditure requirement.

11.6 Approval Process: With respect to the Concessionaire's improvements to the Assigned Premises, the Concessionaire agrees as follows:

- a. The Concessionaire agrees to follow the City's Construction Approval Process. This process, among other things, contains provisions for submission of construction schedules and plans.
- b. The Director shall either approve or disapprove the plans and specifications submitted to the City. The approval by the Director of any plans and specifications refers only to the conformity of such plans and specifications to the general architectural and aesthetic plan for the Assigned Premises. Such plans and specifications are not approved for architectural or engineering design or compliance with applicable laws or codes and the City does not assume liability or responsibility thereof or for any defect in any structure or improvement constructed according to such plans and specifications by the City's approval of such plans and specifications. The Director reserves the right to reject any plans submitted and require the Concessionaire to resubmit designs and specifications until they meet the Director's approval. At the completion of the construction of the Assigned Premises the Concessionaire shall submit to the City the documentation required by Paragraph 10.10, herein.

11.7 Annual Refurbishment: Concessionaire shall expend a minimum of ½ of 1 percent (0.005) of total Gross Revenues, commencing in the fourth year of the Term of this Agreement and occurring annually, for refurbishment of the Assigned Premises. Concessionaire shall submit to the City on January 1 of each of these Years of the Term, a schedule of refurbishments and improvements to be completed by Concessionaire in the Assigned Premises for the subsequent Year. Such refurbishment shall include painting and repair attributable to ordinary wear and tear, and replacement of furnishings and fixtures. Such refurbishment shall be required to be spent on those areas visible to and utilized by the customer (i.e.; "selling area"). Concessionaire, if applicable, shall provide documentation of such annual refurbishment and improvement expenditure to the City within thirty (30) calendar days of the earlier of (i) completion of such refurbishment or (ii) the end of the Year. In addition to the required Annual Refurbishment, Concessionaire shall refurbish the Assigned Premises promptly upon the observation of any damage or deterioration of the original materials/workmanship or as reasonably required by the Director. Failure to complete any required refurbishment within the time specified by the director shall be in default under this Agreement, and in addition to all other remedies available under this Agreement, Concessionaire shall pay, as Liquidated Damages, One Hundred and No/100 (\$100.00) per day until such required refurbishment is completed. Concessionaire agrees and acknowledges that the failure to refurbish is detrimental to the image of the Facilities and results in lost percentage rent, the exact loss and injury is extremely difficult to fix. Therefore, the parties agree that the above-described amount represents a fair and

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reasonable estimate of the monetary losses and damages incurred by the City.

11.8 All Fixed Improvements and Trade Fixtures at the Assigned Premises shall be and remain the property of Concessionaire until the expiration of the Term of this Agreement or upon termination of this Agreement (whether by expiration of the Term, cancellation, forfeiture, or otherwise, whichever first occurs); at which time the said Fixed Improvements shall become, at the option of the City, the property of the City. Any Trade Fixtures and Personal Property of Concessionaire shall remain the property of Concessionaire except as provided in Paragraph 5.1.

11.9 Upon completion of initial improvements to the Assigned Premises outlined hereinabove, the Concessionaire shall have the right to install or erect additional, non-structural improvements in the Assigned Premises; provided however, that all such alterations shall be commenced only after plans and specifications have been submitted to and approved by the Director. Any such alterations and/or repairs shall be without cost to the City, completed within the time specified in the written approval, and with the least disturbance possible to the operation of the Airport, the Airport tenants, and to the public.

11.10 The ultimate control over the quality and acceptability of the finishes in the Assigned Premises will be retained by the City. All improvements and finishes shall conform to Airport standards, all building, health, fire, and other applicable codes, ordinances, rules and regulations.

11.11 Within ninety (90) calendar days of the completion of construction required under this Agreement, the construction contractor(s), architect(s), and engineer(s) must provide the City with: (1) a certified statement from the construction contractor(s), architect(s) and engineer(s) specifying the total construction cost; (2) a certification that the improvements have been constructed in accordance with the approved plans and specifications, and in strict compliance with all applicable building codes, laws, rules, ordinances and regulations; and (3) certified proof in writing demonstrating that no liens exist or have been filed or may be filed by reason of any or all of the construction. If the total construction cost is less than the minimum amount specified in Paragraph 11.7 above, the difference shall be paid to the City within ten (10) days after submission of a certified statement of construction costs. Such amounts paid to the City hereunder shall not be deemed a cost of Fixed Improvements or Trade Fixtures for any purpose under this Agreement nor shall it be deemed payment of or receipt of any rentals, percentage payments or minimum rent due hereunder.

11.12 The Concessionaire shall not remove or demolish, in whole or in part, any Fixed Improvements upon the Assigned Premises without prior written consent of the Director, which consent may be conditioned upon the obligation of Concessionaire to replace the same by a specified Fixed Improvement.

11.13 Within thirty (30) calendar days of the end of each Year, the Concessionaire shall provide the City with a depreciation and/or amortization schedule, as appropriate, for all Fixed Improvements made pursuant to this Agreement. For purposes of computing depreciation/amortization of Fixed Improvements, the Concessionaire's approved and certified cost for such Fixed Improvement shall be depreciated/amortized over a period of not more than the Term of this Agreement on a straight line basis with no salvage value.

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ARTICLE XII MAINTENANCE AND REPAIRS

12.1 The Concessionaire agrees to provide at its own expense maintenance, custodial, and cleaning services for the Assigned Premises. Concessionaire shall keep all of the Assigned Premises and all of the Fixed Improvements, Trade Fixtures, Personal Property, stock, etc. located therein, clean and in good order and shall observe superior sanitation standards at all times. Concessionaire shall keep the Assigned Premises and surrounding areas free of debris, trash, merchandise delivery or packing boxes. Concessionaire shall ensure that all walls, floors, cash wrap, serving, passenger sales areas and employee areas, counters, equipment and other surfaces are cleaned and sanitized at least daily.

- a. Concessionaire shall use at Concessionaire's sole cost and expense such pest extermination contractor as the City may direct and at such intervals as the City may require.
- b. Concessionaire shall ensure that all personnel conform to personal hygiene and product handling requirements established by Concessionaire, the City or applicable laws, rules, regulations and ordinances.

12.2 At no cost to the City, the Concessionaire agrees to keep and maintain, in good working order, and make necessary repairs, which repairs shall include all necessary replacements, capital expenditures and compliance with all laws now or hereafter adopted, the Assigned Premises and every part thereof and any and all appurtenances thereto wherever located, including by way of example only but without limitation, the Fixed Improvements, Trade Fixtures and concessionaires equipment, the window frames, interior windows, plate glass, doors, door frames and checks, keys, locks and entrances, storefronts, security gates, utility lines and connections, signs, lighting fixtures, bulbs and tubes, floors, floor coverings, interior walls, wall coverings, ceiling, the surfaces of Airport base building interior columns exclusive of structural deficiencies, any columns or structural improvements erected by Concessionaire, partitions, utility systems, utility lines, utility equipment, HVAC systems, connections and ductwork, sprinkler systems, electrical systems, electrical lines, electrical equipment and all other work, improvements and repairs and replacements, renewals and restorations, interior and exterior, ordinary and extraordinary, foreseen and unforeseen.. Concessionaire shall ensure that all equipment, devices, electrical lights and bulbs are fully functional at all times. Concessionaire shall ensure that all security and fire exits are fully operational and in excellent working order at all times. Concessionaire shall utilize its best efforts to repair these items if required.

12.3 All work, repairs done by the Concessionaire or on its behalf shall be of first class quality in both materials and workmanship. All work and repairs shall be subject to inspection, review and approval by the Director and shall be made in conformity with the rules and regulations prescribed from time to time by the City and/or Federal, state, or local authorities having jurisdiction over the work in the Concessionaire's Assigned Premises. All service companies utilized by Concessionaire shall be subject to Airport security and other Airport regulations.

12.4 Concessionaire shall provide a complete and proper arrangement for the adequate sanitary gathering, sorting, transportation, handling and disposal, away from the Airport, of all trash,

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garbage and other refuse caused as a result of its operations as described herein (trash removal). Concessionaire shall provide and use transportation devices and receptacles for all garbage, trash, or other refuse which meet the Airports specifications. Piling of boxes, cartons, barrels or other similar items in an unsightly or unsafe manner on or about the Assigned Premises is forbidden. All garbage and refuse shall be prepared for collection in the manner and at the time and places specified by the City. If the City shall provide or designate a service for picking up refuse and garbage, Concessionaire shall be required to use said service at Concessionaire's proportional cost of said service. Concessionaire shall provide garbage and refuse containers as specified by the City. Concessionaire shall be required to regularly clean and sanitize such containers on a regular basis, or as directed by the Director.

12.5 Waterproofing: The City shall require Concessionaire to install, keep and maintain and repair all pipes or lines for water, drainage or sewer ("plumbing lines") such that they are sealed or protected against leakage or discharge of odors in conformance with the Airports requirements whether or not such requirements exceed the minimum requirements of the applicable building codes. In the event that such Plumbing Lines leak, Concessionaire shall at its sole cost and expense and within three (3) calendar days of receipt of notice from the Airport (which notice may be by telephone) repair such Plumbing Lines. Any such repair shall be in strict conformance to Exhibit D. Concessionaire shall promptly reimburse the City or other tenant for any physical damage to any thing, improvement or property resulting from such leakage. Upon the third occasion of any leak from such Plumbing Lines during the Term hereof, the City shall be entitled to require Concessionaire, at Concessionaires sole cost and expense, to remove the Plumbing Line and completely seal off in a watertight condition the opening from which such Plumbing Line extended.

The City shall require Concessionaire to install, maintain and repair waterproof membrane systems under all floors such that they are sealed or protected against leakage in conformance with the Airports requirements whether or not such requirements exceed the minimum requirements of the applicable building codes. In the event that such floors leak, Concessionaire shall at its sole cost and expense and within three (3) calendar days of receipt of notice from the Airport (which notice may be by telephone) repair such waterproof system, which may require the Concessionaire to remove the floor treatment (tile, carpet, etc.), and reapply a watertight floor treatment which meets the requirements of the City. Any such repair shall be in strict conformance to Exhibit D. Concessionaire shall reimburse the City or other tenant for any physical damage to its ceiling tiles or property resulting from such leakage. Upon the third occasion of any leak from the floor during the Term hereof, the City shall be entitled to revoke Concessionaires right and privilege to utilize water in the Assigned Premises.

12.6 The City and its agents shall have the right to enter the Concessionaire's Assigned Premises to:

- a. Inspect the Assigned Premises during the Airport Hours and/or at any time in case of emergency, to determine whether the Concessionaire has complied with and is complying with the terms and conditions of this Agreement. The Director may, at his discretion, require the Concessionaire to effect repairs at the Concessionaire's sole cost and expense;

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- b. Perform any and all things which the Concessionaire is obligated to and has failed to do after fifteen (15) calendar days written notice to act and/or at any time in case emergency, including: maintenance, repairs and replacements to the Concessionaire's Assigned Premises. The cost of all labor and materials, and other charges required for performance of such work, plus twenty-five (25) percent thereof for administrative overhead, will be invoiced to the Concessionaire and Concessionaire shall remit payments in full thereof to the City within ten (10) calendar days following receipt of invoice by Concessionaire; or
- c. Perform any duty or function that the City may have in relation to the operations of the Airport.

ARTICLE XIII LIABILITY, INDEMNITY, AND INSURANCE

13.1 Increase Liability: Concessionaire shall not do or permit any act or thing upon the Assigned Premises which will invalidate, suspend or increase the rate of any insurance policy carried by the City, covering the Assigned Premises, or the buildings in which the same are located or the Airport, or which, in the opinion of the City, may constitute a hazardous condition that will increase the risks normally attendant upon the operations contemplated under this Agreement.

If, by reason of any failure on the part of Concessionaire after receipt of notice in writing from the City to comply with the provisions of this paragraph, any insurance rate shall at any time be higher than it normally would be, then Concessionaire shall pay the City, on demand, that part of all insurance premiums paid by the City which have been charged because of such violation of failure of Concessionaire.

13.2 Each party hereto shall give to the other prompt and timely written notice of any claim made or suit instituted coming to its knowledge which in any way directly or indirectly, contingently or otherwise, affects or might affect either, and each shall have the right to participate in the defense of the same to the extent of its own interest.

13.3 Indemnity: Concessionaire shall hold City completely harmless and indemnify, protect and defend City and City's officials, members, employees, volunteers and agents against any and all claims, judgments, fines, penalties, forfeitures, damages, demands, liabilities, suits, notices, costs and expenses (including all reasonable costs and expenses for investigation and defense thereof [including, but not limited to attorney fees, court costs and expert fees]), or any one, more or all of these, of any nature whatsoever, arising or allegedly arising, directly or indirectly, out of, as a result of, or incident to, or in any way connected with: (1) Concessionaire occupancy(ies) and/or use(s) of any part or all of the leased premises; (2) Concessionaire exercise of any one, more or all of the rights and privileges herein granted; (3) any breach or default in the performance of any obligation on Concessionaire part to be performed under the terms of this Agreement; and/or (4) any act(s) or omission(s) on the part of Concessionaire and/or officer(s), agent(s), employee(s), contractor(s), sub-

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contractor(s), servant(s), or representative(s) of Concessionaire during the life hereof, EXCEPT for any claims, judgments, fines, penalties, forfeitures, damages, demands, liabilities, suits, notices, costs and expenses, or any of these, caused solely by the active negligence or by the willful misconduct of City or any of its officials, officers, or employees acting within the scope of their duties for City.

City shall give to Concessionaire reasonable notice of any such claims or actions.

THE PROVISIONS OF THIS SECTION OF THIS ARTICLE SHALL SURVIVE THE EXPIRATION OR EARLY TERMINATION OF THIS LEASE.

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- a. 13.4 Exemption of the city LESSOR SHALL NOT be liable for, and is hereby released from, all liability to Lessee, Lessee's insurance carrier(s), or any person claiming under or through Lessee, for any loss or damage to Lessee's business or any loss of income therefrom or for damage to the goods, wares, merchandise or other property located in, upon or about the leased premises, whether belonging to Lessee or any other person; NOR shall Lessor be liable for injury to Lessee or Lessee's employees, agents, contractors, subcontractors, customers, or invitees caused by fire, steam, electricity, gas, water, rain, leakage, breakage, obstruction, pipe defects, sprinkler, wires, appliances, plumbing, air conditioning, lighting fixtures, or any other cause, arising on the leased premises. Lessee shall be solely responsible for the safety and security of the leased premises and the safety and security of all equipment, supplies, and commodities used or sold by Lessee. Lessee also covenants and agrees that Lessor SHALL NOT be liable for damages arising from any act or neglect on the part of any third parties..

13.5 exemption of the City: LESSOR SHALL NOT be liable for, and is hereby released from, all liability to Lessee, Lessee's insurance carrier(s), or any person claiming under or through Lessee, for any loss or damage to Lessee's business or any loss of income therefrom or for damage to the goods, wares, merchandise or other property located in, upon or about the leased premises, whether belonging to Lessee or any other person; NOR shall Lessor be liable for injury to Lessee or Lessee's employees, agents, contractors, subcontractors, customers, or invitees caused by fire, steam, electricity, gas, water, rain, leakage, breakage, obstruction, pipe defects, sprinkler, wires, appliances, plumbing, air conditioning, lighting fixtures, or any other cause, arising on the leased premises. Lessee shall be solely responsible for the safety and security of the leased premises and the safety and security of all equipment, supplies, and commodities used or sold by Lessee. Lessee also covenants and agrees that Lessor SHALL NOT be liable for damages arising from any act or neglect on the part of any third parties.

13.6 Insurance Throughout the life of this Agreement, the Concessionaire shall pay for and maintain in full force and effect all policies of insurance required hereunder with an insurance company(s) either (i) admitted by the California Insurance Commissioner to do business in the State of California and rated not less than "A- VII" in Best's Insurance Rating Guide; (ii) authorized by the CITY'S Risk Manager. The following policies of insurance are required:

13.7 Commercial General Liability: which shall include Owners, Landlords and Tenant's liability, premises liability, contractual, products and completed operations coverages, fire legal liability, bodily injury and property damage liability insurance with combined single limits of not less than \$1,000,000 per occurrence.

13.8 Commercial Automobile Liability: Endorsed for "any auto" with combined single limits of liability of not less than \$1,000,000 per occurrence. If Concessionaire shall use motor vehicles on the aircraft ramps, taxiways, or runways of the Airport and such vehicles are not escorted by escorts authorized and approved by the City, the limit of the automobile liability insurance required to be maintained by the Concessionaire shall be increased to a limit of not less than \$10,000,000 each accident. Insurance may be combination of primary and excess coverage.

13.9 Worker's Compensation: as required under the California Labor Code.

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13.10 Proof of Insurance: The above described policies of insurance shall be endorsed to provide an unrestricted thirty (30) day written notice in favor of the City, of policy cancellation, change or reduction of coverage, except for the Workers' Compensation policy which shall provide a ten (10) day written notice of such cancellation, change or reduction of coverage. In the event any policies are due to expire during the term of this Agreement, the Concessionaire shall provide a new certificate evidencing renewal of such policy(ies). Upon issuance by the insurer, broker, or agent of a notice of cancellation, change or reduction in coverage, the Concessionaire shall file with City a certified copy of the new or renewal policy and certificates for such policy.

The General Liability and Automobile Liability insurance policies shall be written on an occurrence form and shall name the CITY, its officers, officials, agents, employees and volunteers as an additional insured. Such policy(ies) of insurance shall be endorsed so the (ENTITY'S)insurance shall be primary and no contribution shall be required of the City. The Concessionaire shall furnish the CITY with the certificate(s) and applicable endorsements for ALL required insurance prior to CITY's execution of the Agreement. The Concessionaire shall furnish the CITY with copies of the actual policies upon the request of the CITY'S Risk Manager at any time during the life of the Agreement or any extension.

13.11 Failure to Maintain Insurance: If at any time during the life of the Agreement or any extension, the Concessionaire fails to maintain the required insurance in full force and effect, all work under this Agreement shall be discontinued immediately, and all payments due or that become due to the Concessionaire shall be withheld until notice is received by CITY that the required insurance has been restored to full force and effect and that the premiums therefore have been paid for a period satisfactory to CITY. Any failure to maintain the required insurance shall be sufficient cause for CITY to terminate this Agreement.

If the Concessionaire should subcontract all or any portion of the work to be performed under this Agreement, the Concessionaire shall require each subcontractor to provide insurance protection in favor of the CITY, its officers, officials, employees, agents and volunteers in accordance with the terms of each of the preceding paragraphs, except that the subcontractors' certificates and endorsements shall be on file with the Concessionaire and CITY prior to the commencement of any work by the subcontractor.

13.12 Contractor Bond and Insurance: Concessionaire shall require that any contractor or contractors who perform any work contemplated herein on behalf of or for the benefit of the Concessionaire to furnish a performance bond with a good and sufficient surety admitted by the California Insurance Commissioner to do business in the state of California in an amount not less than the full amount of the contract price for completing the finishing, fixturing, and furnishing of the Assigned Premises for the faithful performance of the contract by the contractor(s) and a good and sufficient payment bond in the full amount of the contract guaranteeing the payment of all persons performing labor and furnishing material in connection with the work. Concessionaire shall further require the contractor(s) to procure adequate Contractor's Commercial General Liability Insurance, Business Automobile Liability Insurance, Property Damage Insurance and Worker's Compensation Insurance, including Employer's Liability Insurance, as indicated in Paragraphs 13.4, 13.5, 13.6, 13.7

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and 13.8. Concessionaire shall, before the commencement of any work, furnish the City with evidence that the contractor or contractors are covered to the satisfaction of the Director with insurance as outlined above. If at any time any surety required hereunder becomes unacceptable to the City, the City shall have the right to require additional and sufficient sureties, which the contractor shall furnish with ten (10) calendar days of written notice to do so.

13.13 General Insurance Provisions: Concessionaire's insurance shall be primary and noncontributory with respect to any other insurance or insurance retentions available to or for the benefit of the City. Concessionaire's insurance policies shall contain a severability of interest clause. Any deductibles or retentions are subject to approval by the City.

13.14 Waiver of Subrogation: The City and Concessionaire hereby release the other from any and all liability or responsibility for any loss or damage to property caused by an insured fire or any other insured peril to the extent of any insurance proceeds received by the releaser, even if such fire or other casualty shall have been caused by the fault or negligence of the other party or anyone for whom such party may be responsible; provided, however, that the City's and the Concessionaire's policies contain a clause or endorsement or policy wording to the effect that any such release shall not adversely affect or impair said policy or prejudice the right of the releaser to recover thereunder. The foregoing release shall not apply to the intentional acts or omissions of either party. (need Risk Dept approval of this provision)

13.15 Performance Guarantee: Concessionaire shall guarantee performance under this Agreement in accordance with the following provisions:

- a. On the Effective Date of the Agreement, Concessionaire shall provide the City with a document(s) providing for financial guarantees under this Agreement. Such financial guarantee document(s) shall be in the amount of _____ and ____/100 Dollars (\$_____).

At the discretion of the Concessionaire, this financial guarantee may be: (i) in the form of an irrevocable letter of credit drawn on a banking institution acceptable to the City, in favor of and deposited with the City; (ii) in the form of a surety bond issued by an insurance company or surety company qualified and admitted to do business in the State of California. Such insurance company or surety company shall be acceptable to the City or (iii) a combination of both (i) and (ii).

- b. Commitment documents providing for continuation or replacement of the financial guarantee documents shall be received by the City at least thirty (30) days prior to their expiration.
- c. In the event Concessionaire shall at any time fail to have in effect the Performance Guarantee required under the provisions of this Agreement, upon written notice to the Concessionaire of its intention to do so, the City shall have the right, but not the obligation, to secure the Guarantee required

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hereunder at the cost and expense of the Concessionaire. In such event Concessionaire agrees to reimburse the City for the cost thereof plus fifteen percent (15%) thereof for administrative overhead.

- d. Failure to obtain, maintain, renew such financial guarantee(s) upon expiration of their coverage term shall be deemed a material breach of this Agreement.

ARTICLE XIV ASSIGNMENT, DELEGATION, AND CHANGE OF OWNERSHIP

14.1 This Agreement and the rights and privileges contained herein are personal to Concessionaire and Concessionaire agrees that it shall not assign, mortgage, pledge, or transfer this Agreement or any other right, privilege or license conferred by this Agreement, either in whole or in part, or permit use of any Assigned Premises by another, or in any manner encumber the Assigned Premises or any part thereof, without obtaining in advance the written consent of the City.

14.2 The Concessionaire shall obtain the written consent of the City prior to any change in form of business organization or merger or any change or transfer of the controlling interest in Concessionaire and any change, transfer or merger without such consent of the City shall constitute a breach of the Agreement. Concessionaire agrees to provide the City with sufficient financial and other records and information as determined by the City, for any such person, corporation or entity. Such records and information shall be used by the City to accurately evaluate and assess the financial qualifications, responsibility, standing and capability of said person, corporation or entity.

14.3 This Agreement and the rights and privileges contained herein are personal to Concessionaire and the Concessionaire shall agree that it will not assign, sublet or sublicense the same or any portion thereof, or assign, sublet or sublicense the Agreement or any portion thereof or advertise for assignment, sublet or sublicense of the Assigned Premises or Agreement without the expressed prior consent of the City, in writing, and any purported assignment in violation hereof shall be void and shall be a breach of this Agreement. In determining whether to grant its consent, the Concessionaire shall provide sufficient financial and other records and information, as determined by the City, of any proposed assignee or sublessee or sublicensee in order for the City to accurately evaluate and assess the financial qualifications, responsibility, standing and capability of proposed assignee or sublessee or sublicensee.

14.4 The City reserves the right to deny any assignment, subcontract, sublease or sublicense or other use right or permit hereunder for any reason. Any approved assignee, sublessee, sublicensee or transferee, shall comply with all of the items, conditions and obligations of Concessionaire as provided in the Agreement.

ARTICLE XV DAMAGE OR DESTRUCTION OF ASSIGNED PREMISES

15.1 Notice; Options: If all or a portion of the Assigned Premises are damaged or destroyed by fire, explosion, the elements, or other casualty, the City in its sole discretion may cause

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within its sole and absolute discretion such affected premises to be repaired or reconstructed at no cost to Concessionaire, subject to the limits as set forth in Paragraph 15.4. The Director shall notify Concessionaire within forty-five (45) calendar days of such occurrence of the City's intentions to repair or reconstruct or not to repair or reconstruct. Provided, however, if said damage is caused by the negligent or wrongful act or omission to act of Concessionaire agents or employees, and the City elects to repair or reconstruct, Concessionaire shall be responsible for reimbursing the City for the cost and expense incurred in such repair.

15.2 Damage: Subject to the provisions of Paragraphs 15.1 and 15.4, if the damages are so extensive as to render the Assigned Premises or a portion thereof untenable, and notice of intent to repair or reconstruct has been given by the City, an appropriate portion of the Minimum Annual Guarantee and other fees and charges payable to the City pursuant to the Terms of this Agreement shall abate from the time of the damage until such time as the damaged premises are fully restored and certified by the City as again ready for use; provided, however, that if said damage is caused by the negligent or wrongful act or omission to act of Concessionaire or the agents or employees of either, payment of said Rent, fees and charges to the City by Concessionaire shall not abate.

15.3 Destruction: In the event all or a portion greater than fifty-percent (50%) of the Assigned Premises is completely destroyed by fire, explosion, the elements, public enemy or other casualty, or are so damaged that they are untenable and notice of intent not to repair or reconstruct has been issued, Concessionaire may terminate this Agreement in its entirety as of the date of such destruction. If such destruction is a result of the negligent or wrongful act or omission to act of Concessionaire, its agents, servants, employees, contractors, suppliers, customers, or invitees, Concessionaire shall not have the right to terminate this Agreement and the City may, in its discretion, require Concessionaire to repair and reconstruct said premises within sixty (60) calendar days of such destruction and Concessionaire shall pay the cost therefore.

15.4 Limits of City's Obligations Defined: It is understood that, in the application of the foregoing provisions, the City's obligations shall be limited to: (i) repair or reconstruction of the Assigned Premises to the same extent and of equal quality as existed at the Commencement Date of this Agreement; and (ii) the extent of insurance proceeds available to the City for such purposes. Fixed Improvements, Trade Fixtures, redecoration and replacement of furniture, equipment and supplies shall be the responsibility of the Concessionaire and any such redecoration and refurbishing/re-equipping shall be equal in quality to that originally installed. Nothing in this Article X V shall waive or limit indemnity, defense and hold harmless obligations incurred by Concessionaire under this Agreement.

ARTICLE XVI COMPLIANCE

16.1 The Concessionaire, its officers, agents, servants, employees, contractors, licensees, and any other person over which the Concessionaire has the right to exercise control shall comply with all present and future laws, ordinances, orders, directives, codes, rules, regulations, directives and contract/grant assurances of, or imposed by, the federal, state, and local governmental agencies, including those of the City, which may be applicable to Concessionaire's operations at the Airport.

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16.2 Concessionaire shall pay on or before their respective due dates, to the appropriate collecting authority, all federal, state, and local taxes and fees, which are now or may hereafter be levied upon the Assigned Premises, or upon Concessionaire, or upon the Concessionaire's business conducted at the Airport, or upon Concessionaire's interest hereunder, or upon any of the Concessionaire's property used in connection therewith, including Possessory interest as and when such be applicable to Concessionaire. The Concessionaire agrees to protect and hold harmless City and the Assigned Premises and any and all improvements located therein or thereon and any and all facilities and fixtures appurtenant thereto and any and all other property(ies) located therein or thereon and any and all of Concessionaire's interest(s) in and/or to said Assigned Premises, improvements, appurtenant facilities, fixtures and/or other property(ies), from any and all such taxes and assessments, including any and all interest, penalties and other expenses which may be imposed thereby or result therefrom, and from any lien therefor or sale or other proceedings to enforce payment thereof. Nothing in this paragraph shall be deemed to limit any of Concessionaire's rights to appeal any such levies and/or assessments in accordance with the rules, regulations, laws, statutes, or ordinances governing the appeal process of the taxing authority(ies) making such levies and/or assessments.

Concessionaire acknowledges and agrees that any interest in real property which exists as a result of possession, exclusive use, or a right to possession or exclusive use of any real property (land and/or improvements located therein or thereon) which is owned by the City of Fresno is a Taxable Possessory Interest unless the possessor of interest in such property is exempt from such taxation. With regard to any Possessory interest to be acquired by Concessionaire under this Agreement, Concessionaire, by its signatures hereunto affixed, warrants, stipulates, confirms, acknowledges and agrees that, prior to its executing this Agreement, Concessionaire either took a copy hereof to the office of the Fresno County Tax Assessor or by some other appropriate means independent of City or any employee, agent, or representative of City determined, to Concessionaire's full and complete satisfaction, how much Concessionaire will be taxed, if at all.

16.3 Concessionaire agrees to pay, and hereby guarantees payment of all lawful fines and penalties as may be assessed by the City, Federal, State or local agencies or against the City for violations of federal, state or local laws, ordinances, ruling or regulations, or City rules and regulations by Concessionaire or its officers, agents, servants, employees, contractors, licensees, or any other person over which Concessionaire has the right to exercise control within the earlier of delinquency or thirty (30) calendar days of written notice of such fines or penalties.

16.4 Concessionaire will operate its concessions hereunder in a safe manner and without interfering with the airlines' use of the Facilities, for themselves and for their passengers and other business invitees.

16.5 Concessionaire shall obtain, pay for and continuously maintain current all licenses and permits necessary or required by all applicable Federal, State, county or local laws, regulations, rules, ordinances, codes, standards, orders, licenses or permits for the conduct of the permitted activities hereunder. Concessionaire shall ensure that any such required items are displayed prominently and/or in conformance with applicable guidelines.

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ARTICLE XVII TERMINATION BY CONCESSIONAIRE

17.1 In addition to all other remedies otherwise available to the Concessionaire at law or in equity, the Concessionaire may terminate this Agreement by giving a thirty (30) calendar day written notice to the City of its intent to do so, should any one or more of the following events occur, provided however, that none of the Net Book Value or the Rent, charges and fees which are to be paid by Concessionaire herein will be refunded to Concessionaire and City shall have no other or further obligation to Concessionaire, and further provided that Concessionaire shall remain liable for all obligations accrued under this Agreement through the effective date of termination:

- a. The abandonment of the Airport as an airline terminal or the permanent removal of all certificated passenger airline service from the Airport for longer than ninety (90) consecutive calendar days;
- b. The assumption by the United States government, or any authorized agency thereof, of the operation, control or use of the Airport, or any substantial part or parts thereof in such manner as to substantially restrict Concessionaire from operating thereon for a period of at least ninety (90) consecutive calendar days;
- c. The breach by the City in the performance of any material covenant of this Agreement required to be performed by the City and the failure of the City to commence to remedy such breach for a period of thirty (30) calendar days after receipt of written notice of such breach by the City; or
- d. The issuance of an injunction by a court of competent jurisdiction preventing the use of the Airport in such a manner as to substantially restrict the Concessionaire from conducting its operations hereunder; which prevention or restraint is not caused by the act or omission of the Concessionaire and which injunction remains in force for at least ninety (90) consecutive calendar days.

ARTICLE XVIII TERMINATION BY THE CITY

18.1 In addition to all other remedies otherwise available to the City at law or in equity, the City may terminate this Agreement or may, without terminating this Agreement, take possession of the Assigned Premises by giving a thirty (30) calendar day written notice of its intent to do so to the Concessionaire, should any one or more of the following events occur:

- a. Concessionaire fails to cooperate with any inspection of books and records by the City and/or fails to maintain its books and records as required hereunder;

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- b. Except as otherwise permitted in this Agreement a majority of the ownership interest of Concessionaire is transferred, passes to or devolves upon, by operation of law or otherwise, to any other person, firm or corporation without the written consent of the City;
- c. Except as otherwise permitted in this Agreement, Concessionaire becomes, without the prior written approval of the City, a successor or merged corporation in a merger, a constituent corporation in a consolidation, or a corporation in dissolution;
- d. Concessionaire shall breach, materially breach, default under and/or neglect or fail to perform and observe any promise, covenant or condition set forth in this Agreement after the giving of written notice of such failure by the City to Concessionaire, except where fulfillment of such obligation requires activity over a period of time and Concessionaire has commenced to perform whatever may be required to remedy such failure within ten (10) calendar days after giving of such written notice and continues such performance without interruption; or
- e. Concessionaire service shall deteriorate to the point which, in the sole opinion of the City, materially and adversely affects the operation of service required to be performed by Concessionaire after the giving of written notice of such deterioration by the City to Concessionaire, except where fulfillment of such obligation requires activity over a period of time and Concessionaire has commenced to perform whatever may be required to remedy such failure within ten (10) calendar days after giving of such written notice and continues such performance without interruption.

18.2 In addition to all other remedies otherwise available to the City at law or in equity, the City may immediately terminate this Agreement or may, without terminating this Agreement, take immediate possession of the Assigned Premises by giving written notice of its intent to do so to the Concessionaire, upon the occurrence of any one or more of the following:

- a. Concessionaire fails to pay any rent or payments when due under this Agreement, to provide and maintain insurance, or to provide and maintain a performance guarantee all as required in accordance with this Agreement;
- b. Any lien is filed against the Assigned Premises arising by or through the Concessionaire or because of any act or omission of Concessionaire and such lien is not removed, enjoined or a bond for satisfaction of such lien is not posted within sixty (60) calendar days after Concessionaire receives notice of the filing thereof;
- c. Concessionaire permits to continue, for a period of three (3) days after receipt of written notice from the Director or other agency having jurisdiction, the existence of unsanitary conditions or practices in or about the Assigned

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Premises; provided however, if the unsanitary condition is such as to require replacement, repair or construction, Concessionaire shall have a reasonable time in which to correct, but must begin action on the matter immediately upon receipt of said notice;

- d. Concessionaire abandons, deserts, vacates or discontinues its operation of the business herein authorized from the Assigned Premises for a period of three (3) calendar days without prior written consent of the City; or
- e. A voluntary or involuntary bankruptcy petition is filed by or against Concessionaire and not dismissed within sixty (60) calendar days; or Concessionaire makes an assignment for the benefit of creditors; or Concessionaire is adjudged a bankrupt;

18.3 Acceptance by the City of any rentals or other payments specified in this Agreement, after a breach, material breach, default under, neglect or failure to perform or observe any of the terms of this Agreement shall not be deemed a waiver of any right on the part of the City to terminate this Agreement on account thereof.

18.4 On or before the termination or reentry dates set forth in the written notice by the City to Concessionaire as set out in Paragraphs 3.1, 18.1 and 18.2, Concessionaire shall surrender the Assigned Premises according to and as provided in Paragraph 5.1 herein.

18.5 Upon termination or reentry by the City, the City may reassign Assigned Premises and any improvements thereon or any part thereof to be operated by one or more Suboperators or any other party acceptable to the City, at such rentals, fees and charges and upon such other terms and conditions as the City, in its sole discretion, may deem advisable, with the right to make alterations, repairs or improvements on said Assigned Premises.

18.6 No reentry or reassignment of Assigned Premises by the City shall be construed as an election on The City's part to terminate this Agreement unless a written notice of termination has been given to Concessionaire. In which event, as Liquidated Damages, Concessionaire shall pay to the City, in addition to any monies then owing under the Agreement, the lesser of the following sum: (a) six (6) months of minimum rent or; (b) the remaining minimum rent due under this Agreement. Such sum shall be due and payable upon termination and the City may immediately proceed to bring action to collect thereon. The parties agree that the foregoing sum presents a reasonable forecast of the loss caused by such early termination.

18.7 In the event the City, without terminating this Agreement, re-enters, regains or resumes possession of the Assigned Premises, all of the obligations of Concessionaire hereunder shall survive and shall remain in full force and effect for the full term of this Agreement. Subject to the City's obligation to mitigate damages, the amount or amounts of rent, charges, and fees shall become due and payable to the City to the same extent, at the same time or times and in the same manner as if no re-entry, regaining or resumption of possession had taken place. The City may maintain separate actions each month to recover any monies then due, or at its sole and absolute discretion and at any time, may sue to recover the full deficiency.

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18.8 Bankruptcy: - If the City shall not be permitted to terminate this Agreement as hereinabove provided because of the provisions of Title 11 of the United States Code relating to Bankruptcy, as amended (“Bankruptcy Code”), then Concessionaire as a debtor-in-possession or any trustee for Concessionaire agrees to promptly, within no more than sixty (60) days upon request by the City to the Bankruptcy Court, assume or reject this Agreement. In such event, Concessionaire or any trustee for Concessionaire may only assume this Agreement if (a) it cures and provides adequate assurance that the trustee will promptly cure any default hereunder, (b) compensates or provides adequate assurances that the trustee or Concessionaire will promptly compensate The City for any actual pecuniary loss to the City resulting from Concessionaire’s default, and (c) provides adequate assurance of performance during the fully stated term hereof of all of the terms, covenants, and provisions of this Agreement to be performed by Concessionaire. In no event after the assumption of this Agreement shall any then existing default remain uncured for a period in excess of the earlier of ten (10) days or the time period set herein.

ARTICLE XIX GOVERNMENTAL AND SUBORDINATION PROVISIONS

19.1 Nondiscrimination

- a. The Concessionaire, for itself, its personal representatives, successors in interest, and assigns, as a part of the consideration hereof, does hereby covenant and agree that in the event facilities are constructed, maintained, or otherwise operated on the said property described in this Agreement for a purpose for which a Department of Transportation program or activity is extended or for another purpose involving the provision of similar services or benefits, the Concessionaire shall maintain and operate such facilities and services in compliance with all applicable requirements imposed upon Concessionaire pursuant to 49 CFR Part 21, Nondiscrimination in Federally Assisted Programs of the Department of Transportation, and as said Regulations may be amended.
- b. Concessionaire, for itself, its personal representatives, successors in interest, and assigns, as part of the consideration hereof, does hereby covenant and agree that (1) no person, on the grounds of race, color, or national origin shall be excluded from participation, denied the benefits of, or be otherwise subjected to discrimination in the use of said facilities; (2) that in the construction of any improvements and the furnishing of services, no person on the grounds of race, color, creed, or national origin shall be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination; (3) that the Concessionaire shall use the Assigned Premises in compliance with all other applicable requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary Part 21, Nondiscrimination in Federally Assisted Programs of the Department of Transportation, and as said Regulations may be amended.

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- c. That in the event of breach of any of the above nondiscrimination covenants, the City shall have the right to terminate this Agreement and re-enter and repossess said Assigned Premises, and hold the same as if said Agreement had never been made or issued and no reimbursement shall be made to Concessionaire. This provision shall not be effective until the procedures of 49 CFR, Part 21, are followed and completed including exercise or expiration of appeal rights.
- d. The Concessionaire shall furnish its accommodations and/or services on a fair, equal, and nondiscriminatory basis to all users thereof, and it shall charge fair, reasonable, and nondiscriminatory prices for each unit of services provided however, the Concessionaire may make reasonable and nondiscriminatory discounts, rebates and other similar types of price reduction to volume purchasers unless otherwise provided in this Agreement.
- e. If required to do so under applicable law, the Concessionaire assures that it shall undertake an affirmative action program as required by 14 CFR Part 152, Subpart E, to insure that no person shall on the grounds of race, creed, color, national origin, gender, or disability be excluded from participating in any employment activities covered in 14 CFR Part 152 Subpart E. The Concessionaire assures that no person shall be excluded on these grounds from participating in or receiving the services or benefits of any program or activity covered by this subpart. The Concessionaire assures that it shall require that its covered suborganizations provide assurances to the Concessionaire that they similarly shall undertake any legally required affirmative action programs and that they shall require assurances from their suborganizations, as required by 14 CFR part 152, Subpart E, to the same effect.
- f. The Concessionaire assures that it will comply with any pertinent and legally applicable statutes, Executive Orders, and such rules as are promulgated to assure that no person shall, on the grounds of race, creed, color, national origin, gender, age, or disability be excluded from participating in any activity conducted with or benefiting from Federal assistance. This provision obligates Concessionaire for the period during which Federal assistance is extended to the Airport program, except where Federal assistance is to provide, or is in the form of personal property or real property or interest therein or structures or improvements thereon. In these cases, this provision obligates the Concessionaire or its transferee for the longer of the following periods:
 - 1) The period during which property is used by the City or any transferee for a purpose for which Federal assistance is extended or for another purpose involving the provision of similar services or

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benefits; or

- 2) The period during which the City or any transferee retains ownership or possession of the property.
- g. It is the policy of the Department of Transportation and of the City that Disadvantaged Business Enterprises, as defined in 49 CFR Part 23, shall have the maximum opportunity to participate in the performance of leases as defined in 49 CFR section 23.5. Consequently, the Disadvantaged Business Enterprise (DBE) requirements of 49 CFR Part 23, and the City's DBE program, apply to this Agreement to the extent therein provided.

The Concessionaire agrees to ensure, to the extent legally required to do so, that Disadvantaged Business Enterprises, as defined in 49 CFR, Part 23, have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds provided under this Agreement. In this regard, Concessionaire shall, to the extent legally obligated to do so, take all necessary and reasonable steps in accordance with 49 CFR, Part 23, to ensure that Disadvantaged Business Enterprises have the maximum opportunity to compete for and perform contracts. Concessionaire shall not discriminate on the basis of race, color, national origin, or gender in the award or performance of Department of Transportation-assisted contracts.

- h. The Concessionaire hereby assures that it shall include all of the above provisions in any and all agreements and contracts or subagreements and subcontracts entered into by it under which the Concessionaire grants a right or privilege to any person, firm or corporation to render accommodations and/or services within or for the Assigned Premises and will similarly cause the same to be included in any further subleases, subcontracts or subagreements.
- i. The Concessionaire has been advised, and understands, that failure to carry out the requirements of this Article and of any legally applicable DBE regulations will constitute a breach of this Agreement.
- j. As used herein, the term "Department of Transportation" means the United States Department of Transportation.

19.2 Federal Aviation Act, Section 308 - Nothing herein contained shall be deemed to grant the Concessionaire any exclusive right or privilege within the meaning of Section 308 of the Federal Aviation Act for the conduct of any activity on the Airport, except that, subject to the terms and conditions hereof, the Concessionaire shall have the right to use the Assigned Premises under the provisions of this Agreement.

19.3 Subordination

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- a. This Agreement is subject to and subordinate to the provisions of any agreement heretofore or hereafter made between the City and the United States Government relative to the financing, operation or maintenance of the Airport, the execution of which has been required as a condition precedent to the transfer of rights or property to the City for Airport purposes, or the acquisition or expenditure of funds for the improvement or development of the Airport, including the expenditure of Federal funds for the development of the Airport in accordance with the provisions of the Federal Aviation Act of 1958, as amended from time to time.
- b. This Agreement is subject to and subordinate to the provisions of the Bond Resolution. .
- c. Concessionaire shall not use the Assigned Premises, conduct its operations hereunder in any manner, or do or omit to do anything which adversely impacts the tax-exempt status of the interest on the Bonds, as defined in the Bond Resolutions issued by the City to finance construction at the Airport. Without limiting the foregoing, Concessionaire hereby acknowledges title to the Assigned Premises is solely in the City. Concessionaire elects pursuant to Section 142(b)(1)(B)(i) of the Internal Revenue Code of 1986, as amended, that it will not claim depreciation or investment tax credit for federal income tax purposes with respect to any portion of the Assigned Premises financed with obligations issued by the City, or any other governmental entity, the interest on which is excludable on gross income pursuant Section 103 of the Internal Revenue Code of 1986, as amended, ("for all purposes hereinafter set out in this paragraph all such obligations are collectively referred to as Bonds"), unless the City gives its written consent to do otherwise and unless a written opinion of counsel nationally recognized in matters relating to the issuance of state and local obligations and satisfactory to the City (for the purposes of this paragraph "Bond Counsel") is provided to them by Concessionaire to the effect that such election is not necessary in order to maintain the tax exempt status of such Bonds. It is further agreed that said elections shall be irrevocable and binding upon the Concessionaire, and any successor in interest to it or them and that any agreements and any publicly recorded documents in lieu of such agreements shall state that neither the Concessionaire, nor any of their successors in interest may claim depreciation or investment tax credit with respect to the Assigned Premises to any other properties or facilities financed with Bonds now or hereafter used hereunder unless the consents and Bond Counsel opinion referenced above are obtained.

ARTICLE XX GENERAL PROVISIONS

20.1 Nonwaiver of Rights: No waiver of breach by the City or Concessionaire of any of the terms, covenants, and conditions hereof to be performed, kept, and observed by the other party

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shall be construed as, or shall operate as, a waiver of any subsequent breach of any of the terms, covenants, or conditions herein contained, to be performed, kept, and observed by the other parties.

20.2 Notices: Notices required herein shall only be deemed given if sent by registered or certified mail deposited in the United States mail, postage prepaid. Any such notice so mailed shall be presumed to have been received by the addressee seventy-two (72) hours after deposit of same in the mail. Concessionaire and the City shall have the right, by giving written notice to the other, to change the address at which its notices are to be received. Notices to the City shall be addressed as follows:

Director of Transportation
Fresno Yosemite International Airport

Fresno, CA _____ - _____

Notices to Concessionaire shall be addressed as follows:

If any notice is given in any other manner or at any other place, it shall also be given at the place and in the manner specified above. Any Notice given by facsimile received after 3:00 p.m. local time shall be deemed to have been received at 8:00 am local time, of the recipient, the next business day.

20.3 Captions: The headings of the several articles and paragraphs of this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit, or describe the scope or intent of any provisions of this Agreement and shall not be construed to affect in any manner the terms and provisions hereof or the interpretation or construction thereof.

20.4 Severability: In the event any covenant, condition or provision herein contained is held to be invalid by any court of competent jurisdiction, the invalidity of any such covenant, condition or provision herein contained shall not affect the validity of the remaining covenants, conditions or provisions; of this Agreement.

20.5 Agent for Service of Process and Personal Jurisdiction: It is expressly understood and agreed that if at any time during the Term of this Agreement and for a period of four (4) year after the expiration and/or termination of this Agreement, the Concessionaire is not a resident of the State of California, or is an association or partnership without a member or partner resident of said State, or is a foreign corporation, the Concessionaire will appoint an agent for service of process in the State of California. Due to any failure on the part of said agent, or the inability of said agent to perform, or the Concessionaire's failure to appoint an agent when required, the Concessionaire does hereby designate the Secretary of State, State of California as its agent for the purpose of service of

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process in any court action between it and the City arising out of or based upon this Agreement, and the service shall be made as provided by the laws of the State of California for service upon a non-resident. It is further expressly agreed, covenanted, and stipulated that, if for any reason, service of such process is not possible, as an alternative method of service of process, Concessionaire may be personally served with such process out of this State by the registered mailing of such complaint and process to the Concessionaire at the address set forth herein. Any such service out of this State shall constitute valid service upon the Concessionaire as of the date of mailing. It is further expressly agreed that the Concessionaire is amenable to and hereby agrees to the process so served, and submits to the personal jurisdiction of the State of California, or any Federal court located therein and or exercising jurisdiction over the State of California, and waives any and all obligations and protest thereto, any laws to the contrary notwithstanding.

20.6 Waiver of Claims: The Concessionaire hereby waives any claim against the City and its directors, officers, agents, or employees for loss of anticipated profits caused by any suit or proceedings directly or indirectly attacking the validity of this Agreement or any part thereof, or by any judgment or award in any suit or proceeding declaring this Agreement null, void or voidable, or delaying the same or any part thereof from being carried out.

20.7 Right to Develop Airport: It is further covenanted and agreed that the City reserves the right to further develop or improve the Airport and all landing areas and taxiways as it may see fit, regardless of the desires or views of the Concessionaire and without interference or hindrance.

20.8 Incorporation of Exhibits: All exhibits, documents and instruments referred to in this Agreement are intended to be and hereby are specifically made a part of this Agreement. It is specifically agreed that any or all Exhibits may be modified and substituted in accordance with the provisions of this Agreement without formal amendment hereto.

20.9 Incorporation of Required Provision: The parties incorporate herein by this reference all provisions lawfully required to be contained herein by any governmental body or agency.

20.10 Relationship of Parties: Nothing contained herein shall be deemed or construed by the City or the Concessionaire, or by any other parties, as creating the relationship of employer and employee, principal and agent, partners, joint venturers, or any other similar such relationship, between the parties hereto. The City and Concessionaire shall understand and agree that neither the method of computation of rent, nor any other provision contained herein, nor any acts of the City and the Concessionaire creates a relationship other than the relationship of Concessionaire as permitted of the City.

20.11 Nonliability of Agents or Employees: No director, officer, agent, or employee of the City or the Concessionaire shall be charged personally or held contractually liable by or to the other party under the provisions of this Agreement or because of any breach thereof or because of its or their execution or attempted execution.

20.12 Successors and Assigns Bound: This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, where permitted by this Agreement.

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20.13 Right to Amend: In the event that the Federal Aviation Administration or its successors requires modifications or changes in this Agreement as a condition precedent to the granting of funds for the improvement of the Airport, or otherwise, the Concessionaire agrees to consent to such amendments, modifications, revisions, supplements, or deletions of any of the terms, conditions, or requirements of this Agreement as may be reasonably required.

20.14 Time of Essence: Time is expressed to be of the essence in this Agreement.

20.15 Gender: Words of any gender used in this Agreement shall be held and construed to include any other gender and words in the singular number shall be held to include the plural, unless the context otherwise requires.

20.16 Force Majeure: Except for the payment of any rent or fee or charge required by this Agreement, neither the City nor the Concessionaire shall be liable to the other for any failure, delay or interruption in the performance of any of the terms, covenants or conditions of this Agreement due to causes beyond the control of that party or persons or entities for whose acts or omissions that party is responsible under this Agreement or applicable law, including, without limitation, strikes, boycotts, labor disputes, embargoes, acts of God, acts of the public enemy, acts of superior governmental authority, weather conditions, floods, riots, rebellion, sabotage or any other circumstance for which such party is not responsible or which is not in its own power to control, provided that, should said cause(s) continue for a period beyond ___ months, such shall be a grounds for termination by either party in the manner provide in Article XVII

20.17 Representative of the City: The Director, or his/her representative, shall be designated as the official representative of the City in all matters pertaining to this Agreement. To the extent expressly authorized by City Council, the Director shall have the right and authority to act on behalf of the City with respect to all action required of the City in this Agreement.

20.18 Governing Law and Venue: This Agreement is governed by the laws of the State of California. Any disputes relating to this Agreement or the interpretation thereof must be resolved in accordance with the laws of California. The Concessionaire and The City agree that any legal or equitable action for claims, debts, or obligations arising out of or to enforce the terms of this Agreement shall be brought by Concessionaire or The City in the United States District Court for the Eastern District of California, Fresno Division or in the consolidated Court of Fresno County, California and that either court shall have personal jurisdiction over the parties and venue of the action shall be appropriate in each such court.

20.19 Certification: The Concessionaire, by execution of this Agreement, certifies that it:

- a. Is not owned or controlled by one or more citizens or nationals of a foreign country included in the list of countries that discriminate against U.S. firms published by the Office of the United States Trade Representative (USTR);
- b. Has not knowingly entered into any contract or subcontract for this project with a contractor that is a citizen or national of a foreign country on said list, or is owned or controlled directly or indirectly by one or more citizens or

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nationals of a foreign country on said list; or

- c. Has not procured any product nor subcontracted for the supply of any product for use on the project that is produced in a foreign country on said list.

Unless the restrictions of this clause are waived by the Secretary of Transportation in accordance with 49 CFR 30.17, no contract shall be awarded to a Concessionaire who is unable to certify to the above. If the Concessionaire knowingly procures or subcontracts for the supply of any product or service of a foreign country on the said list for use of the project, the Federal Aviation Administration may direct, through the City, cancellation of the contract at no cost to the Government.

Further, the Concessionaire agrees that it will incorporate this provision for certification without modification in each contract and in all lower tier subcontracts. The Concessionaire may rely upon the certification of a prospective subcontractor unless it has knowledge that the certification is erroneous.

The Concessionaire shall provide immediate written notice to the City if the Concessionaire learns that its certification or that of a subcontractor was erroneous when submitted or has become erroneous by reason of changed circumstances. The subcontractor agrees to provide immediate written notice to the Concessionaire, if at any time it learns that its certification was erroneous by reason of changed circumstances.

This certification is a material representation of fact upon which reliance was placed when making the award. If it is later determined that the Concessionaire or any subcontractor knowingly rendered an erroneous certification, the Federal Aviation Administration may direct, through the City, cancellation of the contract or subcontract for default at no cost to the Government.

Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the certification required by this provision. The knowledge and information of a Concessionaire is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

This certification concerns a matter within the jurisdiction of an agency of the United States of America and the making of a false, fictitious, or fraudulent certification may render the maker subject to prosecution under Title 18, United States Code, Section 1001.

The Concessionaire assures compliance with any and all other applicable Federal regulations, statutes, executive orders and FAA rules, orders, directives or instructions and for purposes of this Agreement the same shall be treated as if specifically set forth and incorporated herein by reference.

20.20 Writing Required: This Agreement may not be amended or otherwise modified in any way whatsoever, except in writing approved by City Council and signed by the parties authorized agents.

20.21 Rights Cumulative: Each right of the parties hereto is cumulative and in addition to each of the other legal rights that a party may have in law or equity. .

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20.22 Subagreements: The Concessionaire hereby assures that it shall include all of the terms, conditions, covenants, obligations, etc. contained herein in any and all agreements and contracts or subagreements and subcontracts entered into by it under which the Concessionaire grants a right or privilege to any person, firm or corporation to render accommodations and/or services within or for the Assigned Premises. Concessionaire shall require the any document so entered into is subordinate in all terms to this Agreement. Concessionaire hereby also assures that it shall similarly cause the same to be included in any further subleases, subcontracts or subagreements. The voluntary or other surrender of this Agreement by Concessionaire or a mutual termination hereof, or a termination by City, or an automatic termination, or termination by a court of competent jurisdiction, or any other termination hereof shall not work a merger, and shall, at the option of City, terminate any or all existing Sub-Leases/Tenancies or may, at the option of City, operate as an assignment to City of any or all such Sub-Leases/Tenancies.

20.23 Inspection of Records – The Concessionaire shall provide all information and reports and shall permit access to and audit of its books, record, accounts and other sources of information, and its facilities, as may be determined by the City or the FAA to be pertinent to ascertain compliance with this Agreement and federal regulations, orders and instructions, for the term of this agreement and three (3) years thereafter. Where any information required of the Concessionaire is in the exclusive possession of another who fails or refuses to furnish this information, the Concessionaire shall so certify to the City or the FAA, as appropriate, and shall set forth what efforts it has made to obtain the information. This paragraph shall survive termination of the Agreement.

20.24 Precedence of Document. In the event of any conflict between this Agreement and any exhibit or attachment hereto, the terms and conditions of the Agreement shall control and take precedence over the terms and conditions expressed within the exhibit or attachment. Furthermore, any terms or conditions contained within any exhibit or attachment hereto which purport to modify the allocation of risk between the parties provided for within the Agreement shall be null and void.

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ARTICLE XXI ENTIRE AGREEMENT

21.1 The parties hereto understand and agree that this document contains the entire Agreement between the parties. The parties further understand and agree that neither party nor its agents have made representations or promises with respect to this Agreement except as expressly set forth herein; and that no claim or liability shall arise for any representations or promises not expressly stated in this Agreement. Any other writing or parol agreement with the other party being expressly waived.

IN WITNESS WHEREOF, the parties hereto have executed these presents through their respective officers duly authorized so to do this _____ day of _____, 200__.

CITY OF FRESNO

BY: _____

Printed Name: _____

Title: _____

Attest:

Printed Name: _____

Secretary-Treasurer

INSERT COMPANY NAME

BY: _____

Printed Name: _____

Title: _____

Attest:

Printed Name: _____

Title: _____

Approved as to form and legality:

Printed Name: _____

Fresno City Attorney's Office

DRAFT COPY

Exhibit A

The Airport

DRAFT COPY

Exhibit B

Assigned Premises

DRAFT COPY

Exhibit C

Permitted Menu Items and Merchandise

Concessionaire has the right, privilege and obligation to provide the following merchandise from the Assigned Premises:

DRAFT COPY

Exhibit D

Concessionaire Report of Gross Sales

DRAFT COPY

Exhibit E

Capital Investment Detail

CERTIFIED ACTUAL FIXED IMPROVEMENT INVESTMENT:

\$ _____ AND _____/100 Dollars
Amount in Dollars Amount in Words

CERTIFIED ACTUAL TRADE FIXTURE INVESTMENT:

\$ _____ AND _____/100 Dollars
Amount in Dollars Amount in Words